Petition

81-1761

Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS
CLERK

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ECKERD DRUGS, INC., a corporation now merged with JACK ECKERD CORPORATION, a corporation and ECKERD'S PROVIDENCE, INC. (Store #4), a wholly-owned subsidiary of ECKERD DRUGS, INC., now merged with JACK ECKERD CORPORATION,

Petitioners,

vs.

SHIRLEY BROWN and DOROTHY BLACK, Plaintiffs, and ALMETTA IVEY, Intervenor, individually and on behalf of all others similarly situated

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it was proper for the District Court to certify a class of persons claiming discriminatory denial of promotions, when neither of the plaintiffs nor the intervenor ever suffered such an injury?

2. Whether the District Court erroneously imposed upon the defendants an improper standard of proof thereby fatally tainting the Court's Findings of Fact and Conclusions of Law?

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OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals, one Judge dissenting, is published at 663 F.2d 1268 (4th Cir. 1981). That Court's Order denying the Company's Petition for Rehearing has not yet been published in the official reporter.

The Memorandum of Decision, Findings of Fact, Conclusions of Law and Judgment of the District Court are unpublished.

All of the foregoing are reproduced in a two-volume Separate Appendix to this Petition.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals embodying its decision and judgment is dated October 21, 1981, and was entered on that date.

Thereafter, the Petitioner herein timely filed with the Court of Appeals a Petition for Rehearing and Suggestion for Rehearing En Banc. That Petition was denied by an equally divided Court on December 16, 1981. The filing of this Petition for a

Writ of Certiorari is within ninety days of such denial of rehearing. Bowman v. Loperena, 311 U.S. 262, 266 (1940).

Jurisdiction to review the decision of the Court of Appeals, by writ of certiorari, is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

THE STATUTORY PROVISIONS INVOLVED

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ."

42 U.S.C. §2000e-2

> " . . . If a charge filed with the Commission pursuant to subsection (b) of this section . . . within one hundred and eighty days from the filing of such charge . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."

42 U.S.C. §2000e-5(f)

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1981

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied. . . ."

Rule 23, Federal Rules of Civil Procedure

STATEMENT OF THE CASE

In May of 1976, plaintiffs Shirley Brown and Dorothy Black commenced an action against the Petitioner herein[1] in the United States District Court for the Western District of North Carolina claiming that Eckerds had discriminated against them in violation of Title VII of the Civil Rights Act of 1964, as amended,[2] and 42 U.S.C. §1981. Insofar as is material herein, each of the plaintiffs claimed only that she had been terminated from employment because of race (Black). The Company answered denying all claims.

Following lengthy discovery, the plaintiffs moved the Court to certify the litigation as a "class

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[1]The suit was originally brought against Eckerd Drugs, Inc. The plaintiffs subsequently joined a wholly-owned subsidiary of the Company, Eckerd's Providence, Inc. Thereafter, Eckerd Drugs, Inc. merged with Jack Eckerd Corporation and the latter also was joined by the plaintiffs. Hereinafter they will collectively be referred to as "Eckerds", "the defendants" or "the Company". At present, Jack Eckerd Corporation is the sole corporate entity involved in thie case. There are no parent, subsidiary or affiliated corporations.

[2]42 U.S.C. §2000e, et. seq.

action". The plaintiffs asserted — but offered no competent proof — that their case was an appropriate one for class treatment. Over objection of the defendants, on March 3, 1977, the Court "conditionally and tentatively" certified a class as follows:

> "The class shall consist of plaintiff [sic] and all blacks in the Mecklenburg County facilities of defendant and its wholly owned subsidiary, Eckerd Providence Inc., who have since January 18, 1975, or may have been affected by discrimination by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence Inc. on the basis of race in connection with hiring, promotion, termination, job assignment, and geographical assignment; this class includes all blacks so affected who (a) are currently employed by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc.; (b) have been employed by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc.,; since January 18, 1975, and have been terminated or otherwise left defendant Eckerd Drugs' employment; or (c) have applied for employment with defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc. at any time since January 18, 1975 and were denied employment" (emphasis added).

The Court also ordered the Company to mail a notice of the certification to potential members

of the class, inviting them to come forward and present claims if they so desired.

In May of 1977, plaintiffs moved the Court for "final certification" of the class. Eckerds simultaneously moved for decertification, primarily on the grounds the plaintiffs had failed to show that their case qualified as a class action, as required by Rule 23 of the Federal Rules of Civil Procedure. The Company pointed out that the named plaintiffs had confined their claims to that of discriminatory termination and, therefore, could not properly represent a class of persons claiming to have suffered with regard to hiring, promotion or job assignment. The defendants further showed that the plaintiffs had made no effort to demonstrate the existence of a class of persons claiming to have been terminated because

of race.[3] Nevertheless, on May 24, 1977, the District Court, without opinion, gave final certification to the class as defined above.

In June, Eckerds moved the Court to reconsider its certification order in light of the intervening decision of this Court in East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977). The motion was denied. The Company then moved the Court to certify the question of the propriety of class certification for interlocutory appeal. The District Court refused upon the grounds that there was insufficient evidence in the record for the Court of Appeals to determine whether class certification had

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[3]Of the 466 potential class members who were mailed a notice, only 9 responded with alleged claims. Five claimed they had not been hired, three claimed they had been hired and terminated and one claimed she had not been promoted.

been appropriate.[4] The case thereafter came on for trial in April of 1978.

Each of the plaintiffs presented testimony about her individual claim, as did eight purported class members, and the Company offered evidence in rebuttal.[5]

On June 9, 1977, the Court entered a "Memorandum of Decision" in which it dismissed the allegations of the plaintiff Black but sustained Brown's claim. The Court further dismissed the claims of all the purported class members except one.

Almetta Ivey had been presented by the plaintiffs as a class member even though she made no claim of discrimination in either hiring, promotion, termination, or job assignment. In fact, Ivey testified she had been promoted to a supervisory position.

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[4]Thus, the Court tacitly acknowledged it had failed to require the plaintiffs to make the essential Rule 23 showings.

[5]In addition, both sides presented statistical data.

However, she was later demoted and claimed that was because of her race. This claim was sustained by the Court.

As noted earlier, Brown's claim was limited in all material respects, to her termination. She admitted, both at trial and in an earlier deposition, that on the day of her termination she had been called into a meeting with her supervisors for the purpose of counseling with her about her absenteeism and performance. She further admitted that at some point in the meeting she lost her temper and refused to talk further with her supervisors unless she could have her lawyer or another black present. The Company presented uncontradicted testimony that this insubordination, and it alone, caused her termination.[6]

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[6]Brown claimed she had been told in the counseling meeting she was fired. The Company's evidence indicated she was told she would be required to participate in the counseling session and she responded with an obscenity and left the room. At all times, however, the Company has acknowledged that Brown's termination was involuntary. That is, her refusal to accept counseling would have resulted in her discharge had she not first resigned.

Almetta Ivey admitted that her supervisor, Dale Whitworth, had repeatedly criticized her for her inability to control the employees she supervised, and she even admitted that such criticism was justified. She further admitted that twice she had been passed over with respect to raises, because of her supervisor's dissatisfaction with her performance. Whitworth confirmed this and testified without contradiction that at the time of Ivey's demotion, there was a need to expand the function of her department. Since, in his opinion, Ivey could not manage the department at its then-present level, she was certainly not considered able to handle the additional duties. He testified further that this was the sole reason for her demotion.

Ivey was first offered a transfer to another department, which she refused, and then demoted without loss of pay. She was replaced by a white who, as Whitworth testified, again without contradiction, supervised the expanded department to his full satisfaction.

Neither Brown nor Ivey presented any direct proof that the Company was motivated by racial considerations in its treatment of them, nor did either offer any evidence of white employees who were treated differently in similar circumstances. Neither offered a shred of evidence that the reasons articulated by the Company for its actions were pretextual, nor did the Court point to any such evidence in sustaining their claims.

After finding that Brown quit under pressure,[7] the Court, in its Memorandum of Decision, merely declared:

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[7]The Court obviously meant "unlawful pressure". As noted above, while Eckerds acknowledges that it forced upon Brown the decision to leave its employment, the Company contends it was fully justified in doing so under the circumstances of the meeting. See also in this regard, Note 9 at Page 15, infra.

> "The treatment plaintiff received in the [counseling] meeting would not have occurred had she been white; her conflict with her superiors was due at least in part to her race" (emphasis added).

And, as to the decision to demote Ivey, the Court similarly declared:

> "Although the system of accounting in the third party receivables department was changed in June, 1977, defendant did not demonstrate that Ivey was less capable of handling the new system than the new supervisor brought into the department. Her demotion was due, at least in part, to her race."

> "Almetta Ivey did not file a separate charge of discrimination with the Equal Employment Opportunity Commission; she is not a plaintiff or intervenor in this suit. The court does not find that Ivey's demotion represents any general pattern, practice or policy regarding demotions. There is no evidence that Ivey or any other class member who held a supervisory position was given more onerous duties or was held to a higher standard of performance than whites in comparable supervisory positions. The court would like to hear further from the parties on whether Almetta Ivey is, on these facts, entitled to any relief, and, if so, what relief ought to be afforded" (emphasis added).

With regard to the class claims, the Court held that the plaintiffs had failed to prove a pattern

or practice of discrimination as to discharges, layoffs, pay or working conditions. However, the Court made a finding of class-wide discrimination in hiring at four of the Company's stores and in hiring, promoting or transferring into management and supervisory positions.[8]

The Court directed plaintiffs' counsel to prepare and submit Findings of Fact and Conclusions of Law to support its Memorandum of Decision. Before this was completed, however, the United States Court of Appeals for the Fourth Circuit issued its opinion in Hill v. Western Electric Company, Inc., 596 F.2d 99 (4th Cir. 1979). Again, the Company moved the Court to reconsider the class certification, pointing out that

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[8]This finding was made even though neither plaintiff — and not a single "class" member — presented a valid claim of discrimination in any of these areas. The finding was based solely upon statistical tables presented by the plaintiffs which compared the racial make-up of Eckerds' labor force with that of the general population and general labor force without any regard for job skills or qualifications. The plaintiffs offered no statistical data relative to promotions within the Company.

the opinion in Hill agreed with Eckerds' contention that the plaintiffs in this case were precluded under Rodriguez from representing a class of persons other than one comprised of former employees terminated because of race — a class the Court had specifically found to be non-existent in this case..

The Court agreed to remove from the class all discriminatory hiring claims. It determined to leave in the case only persons claiming to have been denied promotion or transfer into management or supervisory positions. In response to the Company's suggestion that just as with hiring, there was no proper representative for such a class, the Court, one year after completion of trial, allowed Almetta Ivey to intervene as a plaintiff in the case. Additionally, the Court styled her demotion from a supervisory positon as a "failure to promote or transfer" her to a supervisory position so as to "make" her a proper representative of the class it had agreed to certify.

Plaintiffs' proposed Findings of Fact and Conclusions of Law were modified to accommodate the new class, and to reflect minor grammatical changes.[9] On October 30, 1979, they were approved and entered. The Court also ordered backpay and reinstatement to employment for Brown, extensive reshuffling of the Company's hiring and employment policies and procedures, and "Stage II" proceedings before a Special Master to hear class claims. The Company filed exceptions and gave notice of appeal.

Upon appeal, Eckerds pointed out that the District Court's various rulings with regard to the class were in direct conflict with the Fourth Circuit's

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[9]Also, Brown's termination was termed a "constructive discharge" in the Findings of Fact and Conclusions of Law. That is, the Court held that while the Company didn't actually discharge Brown, it made her working conditions so intolerable she was forced to resign.

A comprehensive analysis of the plaintiffs' evidence in this regard — and the District Court's treatment of it — is contained in the dissent to the Opinion of the Court of Appeals. It appears at pp. 107-137 of the Separate Appendix hereto and this Court's attention to it is respectfully invited.

decision in Hill and this Court's decision in Rodriguez. Additionally, the Company argued that Brown had never proven a prima facie case of discrimination, and even if it were deemed that she had, Eckerds had successfully rebutted it by showing that her insubordination was the reason for her discharge.[10]

As to Ivey, the Company argued first that her claim was never properly before the Court since, because her claim was confined to her demotion, she had never been a member of any class certified, and the District Court had specifically found that there was no class of persons claiming discriminatory demotion.

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[10]The appeal was briefed and argued prior to this Court's decision in Texas Dept. of Community Affairs v. Burdine, ___ U.S. ___, 67 L.Ed. 2d 207, 101 S.Ct. 1089 (1981). However, as the dissent noted, Burdine simply reaffirmed the rule regarding the respective burdens of proof in Title VII cases set forth in earlier decisions of this Court such as McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Furnco Construction Co. v. Waters, 438 U.S. 567 (1978) and Board of Trustees v. Sweeney, 439 U.S. 24 (1978).

The Company further argued that even if Ivey's claim were considered an appropriate part of the litigation, she too had failed to make a prima facie showing of discrimination. And, in any case, Whitworth's uncontradicted testimony concerning her incompetence (corroborated by Ivey's own admissions) successfully rebutted any claim she might have made.

In a panel decision (with Judge Russell dissenting), the Court of Appeals ruled that the Company had rebutted successfully the claims of both Brown and Ivey. Nevertheless, the Court felt it was precluded, by the "clearly erroneous rule", from reversing the District Court's ultimate finding that race was a factor in the Company's treatment of these two persons.

With regard to the lower court's treatment of the class action, the majority held that it did not need to consider whether Ivey was an appropriate representative because, it concluded, Brown and Black were. The dissimilarity between their claims of

termination and the class' claims of failure to promote was deemed by the Court to be irrelevant for purposes of Rule 23.

In his dissenting opinion Judge Russell pointed out that such a holding was in direct conflict with Hill and Rodriguez and, further, that the majority had made no effort to distinguish either of those cases.

Finally, the dissent argued that since the majority conceded that the District Court had failed to follow the burden of proof standards set forth in Burdine, the Court of Appeals not only could reverse the findings of the lower court but was obligated to do so.

The Company thereupon filed a timely Petition for Rehearing and, pointing out that the majority's opinion was in direct conflict with another decision of the Fourth Circuit Court of Appeals, suggested that the conflict should be resolved by en banc consideration. On December 16, 1981, the Petition

was denied by an evenly-divided Court. Judge Russell again wrote a dissenting opinion.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

It is respectfully submitted that the Court of Appeals' decision indistinguishably conflicts with prior decisions of this Court. Additionally, it is in direct conflict with decisions of other panels within the same court and with a decision of the Court of Appeals for the Third Circuit. It is submitted that these conflicts can be resolved only by this Court.

ARGUMENT

With regard to Title VII cases, there are among the courts two conflicting interpretations of the Rule 23 requirement that representatives of a class be able to fairly and adequately protect its interests. One view is that a plaintiff can be a proper representative of a class only if the interests and goals of the class are substantially the same as his, and that such situation exists only if the plaintiff claims to

have suffered substantially the same injury as the class he is seeking to represent. Under this view, for example, a former employee of a company claiming a racially motivated discharge cannot be deemed an appropriate representative of a class of applicants claiming that on account of their race the company failed to hire them. For in such state of affairs, the individual would be challenging the Company's policies with respect to discipline and discharge while the class would be seeking to attack the Company's hiring practices. This line of reasoning will be referred to herein as the "same injury" concept.

The other interpretation perceives all claims of racial discrimination as generically the same. Under this view, the interests of a former employee claiming discriminatory discharge and an applicant claiming racially discriminatory failure to hire, are, for purposes of Rule 23, identical since both have a common element of claim, namely, racial discrimination. Proponents of this theory argue that

there is no reason why a person claiming injury from any one of a company's employment practices should not be allowed to represent a class of persons attacking any, or all, other employment practices of that employer, since the contention of racial discrimination is present throughout. This view is commonly known as the "across-the-board" theory.

In 1975, the Fourth Circuit initially subscribed to the "across-the-board" theory in Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975). However, in 1977, this Court handed down its opinion in Rodriguez and, thereafter, the Fourth Circuit, relying upon that decision by this Court, adopted the "same-injury" concept in the case of Hill v. Western Electric, supra, at 101.

Shortly after that, the Court of Appeals for the Third Circuit issued a decision in which it followed the "same-injury" concept, also citing Rodriguez as authority. See Scott v. University of Delaware, 601 F.2d 76, 87-88 (3rd Cir. 1979).

The contrary "across-the-board" theory has been adopted by the Court of Appeals for the Fifth Circuit, but the question of the propriety of that theory is now before this Court in a case from that circuit. See Falcon v. General Telephone Co. of Southwest, ___F.2d___, 25 FEP 1735 (5th Cir. 1981), cert. granted December 7, 1981, sub nom General Telephone Co. of Southwest v. Falcon, No. 81-574.

It cannot be denied that the two holdings of the Fourth Circuit in Hill and Barnett are in direct conflict. However, since Hill is the later decision, and is predicated upon an intervening Supreme Court decision contrary to Barnett, the "same injury" theory of Hill must be deemed the prevailing view in the Fourth Circuit at the present time. Nevertheless, the panel majority in the instant case made no effort to distinguish Hill and, in fact, cited Barnett as authority for its holding.

It is readily apparent that the panel majority in the present case disagrees with the Hill

decision and would have the Court below readopt the "across-the-board" theory of Barnett. It is equally apparent that other members of the Court, including the dissenting judge herein, believe the "same injury" view to be the correct statement of law on this subject.

The conflict ought to be resolved by the Court below en banc, but, given the fact that Eckerds' Petition for Rehearing was denied by an equal division of the Court below, it is obvious that a resolution of the issue is not likely to occur under the present make-up of active judges in that court.

Thus, for the foreseeable future in the Court of Appeals for the Fourth Circuit, contests as to whether the "across-the-board" concept or the "same-injury" concept shall apply in class actions, will depend upon which judges are assigned to hear the case.

It is respectfully submitted that this is a situation calling for resolution by this Court.

With regard to the individual claims in the present case, the panel majority in the Court below

does not dispute that with respect to both Brown and Ivey, the District Court imposed upon the defendant a greater burden of proof than that dictated by this Court in Burdine.

Briefly, under that decision, plaintiffs in Title VII cases must first establish by a preponderance of the evidence a prima facie case. Once this is accomplished, the burden of production — not persuasion — shifts to the defendant to articulate a legitimate non-discriminatory reason for its treatment of the plaintiff. When an employer does so, the burden then shifts again to the plaintiff — and becomes again a burden of persuasion - to show, if he can, that the employer's proffered reasons were pretextual. Burdine, supra, 101 S.Ct. at 1093-1095.

Assuming, arguendo, that Brown and Ivey did make out prima facie claims of discrimination, nevertheless, as the panel majority recognized, the District Court erred in holding that the Company had failed to successfully rebut those claims. That is, the

majority specifically found that Eckerds had met its proper burden of proof under Burdine. The Court further acknowledged that the plaintiffs thereafter offered no evidence to show that the Company's position was pretextual.

Nevertheless, the majority refused to reverse the lower court, reasoning as follows:

(a) The District Court "found as a fact" that Brown's conflict with her supervisors and Ivey's demotion were "due, at least in part, to [their] race";

(b) Such a finding would be impossible, given that the Company had successfully rebutted the plaintiffs' claims unless the Court also had found Eckerds' reasons to be pretextual;

(c) Therefore, even though it made no mention of such, and even though the

plaintiffs presented no evidence of pretext,[11] the District Court must have found pretext.

(d) Appellate courts are precluded from setting aside such findings unless they are clearly erroneous.

With all due respect, no such sequence of reasoning can be justified here. Clearly, The District Court reached the result that it did by first imposing upon the defendant an erroneous standard of proof (as the panel majority acknowledges) and then simply

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[11]The panel majority glosses over the absence of evidence in this regard by asserting that the lower court could have reexamined the evidence already presented to it and predicated a finding of pretext upon that. It is respectfully submitted that that simply cannot be where, as here, such evidence first has been determined to constitute a successfully rebutted prima facie case. That is, if the Court determines from all of the evidence then before it that a defendant has successfully rebutted the plaintiff's claims, it cannot later turn around and rule that the same evidence, with nothing more, supports a finding of pretext. If that were so, then the evidence would not have rebutted the plaintiffs' prima facie case in the first place.

ignoring the issue of pretext (as the opinions of the District Court plainly show).

In such situations, as the dissent below points out, it is entirely proper for appellate courts to examine and reverse findings of fact where they are predicated upon an erroneous legal premise. Such closer scrutiny is even more appropriate where, as here, the Court simply declares, without pointing to any evidence, that an event was motivated by race, and thereafter adopts, on a wholesale basis, the plaintiffs' proposed Findings of Fact as support for its assertion. See Hagans v. Andrus, 651 F.2d 622, 626 (9th Cir. 1981).

Thus, since the panel majority admits that the District Court did not follow Burdine, but nevertheless refuses to reverse, then, in the words of the dissent, the panel majority itself "simply refuses to follow Burdine".

Respectfully submitted,

JOHN O. POLLARD

Attorney for the Petitioners

Appendix

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81-1761

Supreme Court, U.S.
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NO.

IN THE

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OCTOBER TERM, 1981

ECKERD DRUGS, INC., a corporation now merged with JACK ECKERD CORPORATION, a corporation and ECKERD'S PROVIDENCE, INC. (Store #4), a wholly-owned subsidiary of ECKERD DRUGS, INC., now merged with JACK ECKERD CORPORATION,

Petitioners,

vs.

SHIRLEY BROWN and DOROTHY BLACK, Plaintiffs, and ALMETTA IVEY, Intervenor, individually and on behalf of all others similarly situated

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

VOLUME I

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1821

Shirley Brown and Dorothy Black, et al,

Appellees,

versus

Eckerd Drugs, Inc., a corporation now merged with Jack Eckerd Corporation, etc., et al,

Appellants.

O R D E R

The appellants' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll an evenly divided court voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the

petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Murnaghan. Judge Russell, Judge Widener, Judge Hall, Judge Ervin and Judge Chapman would have granted rehearing.

For the Court

s/ William K. Slate, II
CLERK

RUSSELL, CIRCUIT JUDGE, dissenting:

I dissent from the denial by an equally divided vote of the active Judges of rehearing en banc in this case both with reference to the individual and the class claims. I shall state my reasons for dissenting with reference to both claims separately.

Individual Claims

In making its findings in favor of the individual claimants in this case, the district court applied these standards or criteria:

1. The burden to rebut plaintiff's case shifted to the defendant when the plaintiff made out a prima facie case; and
2. To establish a defense to a claim of discrimination in a promotion or replacement decision, the employer must show that the promoted employee or the replacement was "as

> qualified as, or more qualified than" the claimant who was not promoted or replaced.

Both of those legal standards are obviously in error. The majority panel opinion in effect concedes this. So far as the first standard is concerned, the panel opinion syas:

> "The bald statement that Eckerd failed to rebut the prima facie case is difficult to reconcile with the evidence."

The majority panel opinion is more direct in its verdict on the second requirement imposed by the district court on the employer in this case. It said:

> "Furthermore, the [district] court's expressed requirement that the defendant show Ms. Ivey's replacement was as qualified as, or more

qualified than, Ms. Ivey does not follow Burdine." (Italics added)

Those erroneous standards definitely tainted the district court's findings of discrimination in these cases and compelled reversal in this case. The burden of proof imposed by the first erroneous standard has consistently been held to require reversal of a trial court's factual findings in a discrimination case. This is so because the determination of the party on whom the burden of persuasion rests is always important to the factual resolution in a case. No one can state, based on the district court's opinion, that this erroneous burden of proof standard, as applied in this case, was not decisive in the court's findings. The district court repeated throughout its opinion that, when the plaintiff made out a prima facie case, the burden to rebut that case shifted to the defendant. It would seem only reasonable to assume that the district court would

not have declared this rule as to burden of proof, as it understood it, if it had not been using it as the basis for its review of the evidence. When a trial court thus errs in its application of the burden of proof, all the cases which I have seen assume with one exception that the trial court used that standard in reaching its factual findings and have reversed the trial court. The one exception is the majority panel opinion in this case. For a lucid statement contrary to the viewpoint in the majority panel opinion on this point, see Judge Friendly's opinion in Ste. Marie v. Eastern R. Ass'n., 650 F. 2d 395, 398-99 (2d Cir. 1981). Moreover, it must be remembered that it was in part because it made the same error on burden of proof that the trial court was reversed by the Supreme Court in Burdine.

Even clearer is the prejudice from the second erroneous standard followed by the district

court. The Supreme Court in Burdine said unequivocally that Eckerd, in order to defend against Ms. Ivey's claims, did not have to show that Ms. Ivey's replacement was as qualified or more qualified than Ms. Ivey. The district court in this case, however, made as an "expressed requirement" (to use the majority panel opinion's own characterization of the district court's ruling) of any defense by the employer to Ms. Ivey's claim that the employer prove precisely what the Supreme Court held in Burdine it did not have to prove, i.e., that Ms. Ivey's replacement was as well qualified, or more qualified, than Ms. Ivey. Burdine reversed because of this erroneous standard of review; the majority opinion, even though it admits the district court did not follow the rule laid down unmistakeably by the Supreme Court in Burdine, affirms! In effect, the majority panel opinion simply refuses to follow Burdine.

And how does the majority panel opinion justify this disregard of the clear holdings of the Supreme Court in Burdine? It does so under "the clearly erroneous" rule. Yet, we have declared in repeated cases beginning with Macmullen v. South Carolina Electric & Gas Company, 312 F. 2d 662, 670 (4th Cir. 1963), cert. denied, 373 U.S. 912, and continuing with the cases cited by me in my panel dissent, and as the Supreme Court as well, has often declared that, when a trial court has used erroneous legal standards, its findings of fact are not to be reviewed under a "clearly erroneous" standard. The majority panel opinion does not, however, address this problem, nor give any reason why the established rule should not be followed in this case. I suggest that there can be no reason in this case to disregard the established rule.

Finally, it is difficult for me to understand how the majority panel opinion could, as it

has, so completely disregard Burdine, a case the ink on which is hardly dry. If "clearly erroneous" were a sufficient excuse for disregarding the errors the Supreme Court found in the rulings in Burdine, the Supreme Court would have affirmed rather than reversed the decision in that case since the basis for applying the "clearly erroneous" rule could have been as justified in Burdine as in this case.

The point of my dissent on this phase of the petition for rehearing en banc is, to put it simply, no more and no less than that we should follow Burdine and that when we declare as the majority panel opinion herein does that the district court in its ruling "does not follow Burdine," our course is clear; we should reverse the findings in favor of the individual claims.

Class Action

As a prologue to the class action feature of this case, a chronology of the steps in the

litigation - something not done in either the majority or dissenting panel opinion - appears necessary.

This action was begun on May 5, 1976. The plaintiffs were Shirley Brown and Dorothy Black, suing on behalf of themselves individually and as class representatives. The individual complaint of both Brown and Black was an allegedly discriminatory discharge. On motion of the plaintiffs the district court granted conditional certification on March 3, 1977, in favor of a class of all blacks who since January 18, 1975, may have suffered discrimination "on the basis of race in connection with hiring, promotion, termination, job assignment, and geographical assignment." In addition, the order of certification provided for notice to all blacks who might have been employed by the defendant at any time after January 18, 1975, and who were within the class certified. The form of notice to be given was prescribed and emphasized the importance to every

person receiving it to give careful attention to it since "[i]t affects your rights." (These words were in capital letters).

As a result of this order the required notice was mailed to all the more than 400 blacks who were then, or had been at any time after January 18, 1975, employed by the defendant at the designated operations. A small number of persons to whom the notice was directed replied. Those replying were less than 20. One of those who did respond by asserting a claim was Almetta Ivey. Her claim, as stated in her complaint filed with the EEOC, was that the defendant had discriminated against her by "(1) refusing to promote, (2) refusing to give me raises, and (3) demoting me from supervisor. . . ." She also had added a general allegation that the defendant "discriminate[d] against blacks and women by refusing to grant them fair promotions." Only one person out of the more than 400 employees queried responded to the notice with a claim of discrimination in promotion,

i.e., Janice Orr Mackey. She worked at one of the defendant's stores as a fountain employee "under the distributive education program until she was graduated from high school in May, 1976," when she quit "without giving any reason." In her case the district judge, after trial, found specifically:

> "She was not denied a promotion to fountain manager because of her race but because she was still in school and unable to perform all the duties of the fountain manager."

In essence, then, even though every black employee of the defendant subsequent to January 18, 1975 - over 400 of them - was earnestly sought out and solicited as a claimant for discrimination in promotion, only one of such employees made any contention that she had been denied a promotion because of her race (Janice Orr) and the district court found that this one claim was without merit. I repeat: Almetta Ivey had no such claim because actually

she had been promoted; her claim was for demotion.

On April 20, 1978, the cause came on for trial before the court and on June 9, 1978, the district court filed its "Memorandum of Decision." In this "Memorandum of Decision," the district court said:

> "Almetta Ivey did not file a separate charge of discrimination with the Equal Employment Opportunity Commission; she is not a plaintoff or intervenor in this suit. The court does not find that Ivey's demotion represents any general pattern, practice or policy regarding demotions. There is no evidence that Ivey or any other class member who held a supervisory position was given more onerous duties or was held to a higher standard of performance than whites in comparable

> positions. The court would like to hear further from the parties on whether Almetta Ivey is, on these facts, entitled to any relief, and, if so, what relief ought to be afforded."

The district court, also, in this "Memorandum of Decision" refined somewhat its class certification. First, it declared unequivocally that "[p]laintiffs have not established any general discriminatory pattern or policy as to discharges, layoffs, demotions, pay or working conditions." It did state that the "[p]laintiffs have established a prima facie case that Eckerd's discriminates in hiring, promoting or transferring class members into management and supervisory positions, especially in the main office" and had discriminated in hiring in a few stores. It did not find from the evidence, however, one single person who had suffered discrimination "in hiring, promoting, or transferring" or

in being denied employment at any store of the defendant. Its prima facie findings rested wholly on employment statistics which indicated, in the words of the district court, "that blacks [have been] hired [or promoted or transferred] in disproportionately low numbers." Such was the status of the class action when our opinion in Hill v. Western Elec. Co., Inc., 596 F. 2d 99 (4th Cir. 1979), cert. denied, 444 U.S. 929, was filed on April 6, 1979.

As soon as counsel in the case became aware of Hill both moved into action. The defendant in mid-April moved to decertify the class in order to comply with the ruling in Hill and the plaintiff responded to Hill by filing a motion of intervention on behalf of Almetta Ivey. To her petition to intervene Ms. Ivey attached her proposed complaint, in which she described her claim as one for discriminatory demotion and asserted that "her demotion was a

part of a racially discriminatory pattern or practice of 'hiring, transferring or promoting' in management positions." On July 26, 1979, the district court entered its order granting leave to the petitioner Ivey to intervene and finding that the petitioner was "a member of the class certified by the Court in its orders of March 3, 1977 and May 24, 1977" and that her claim was "typical of those of the class." The same day the district court amended its certification order to comply with its understanding of Hill. It thus decertified all "applicants for initial employment" at any of the stores of the defendant and all applicants for employment "in either management or supervisory positions," especially in the main office.

After this order there was no additional testimony taken and there remained only one class actually certified. This class consisted of those denied promotion. There was only one person who had appeared and made a claim of discrimination in

promotion and her claim had been dismissed. In short, then, we have a class certified but consisting of merely a single person who actually had been found to have no claim (Janice Orr Mackey). And this was the situation, even though every black employee of the defendant since January 18, 1975, had been sought as a complainant asserting promotion discrimination. But the district court, as well as plaintiff's counsel, predicated its class relief on the theory that, by allowing Ivey to intervene, a proper class representative had been identified - belatedly, it is true, since the intervention occurred more than a year after trial had been concluded - who could represent the class of minority employees denied promotion. The flaw in all this, though is that Ivey was not complaining that she was denied promotion: she had been promoted. Her complaint was that she had been "demoted" or "replaced" as a supervisor. But she

is the sole basis upon which the whole class relief governing promotion practices of the defendant was grounded.[1]

If, however, we accept the district court's finding that Ivey had a claim of discrimination in promotion, it does not follow that there was an appropriate class of promotion discriminatees sufficiently numerous to support a class certification. If we count Janice Orr Mackey and Ms. Ivey as possible promotion discriminatees, we have only two claimants of promotion discrimination - and this after an exhaustive effort to flush out others in the more than 400 blacks who had been or were

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[1] It is not unfair to assume that plaintiffs' counsel rushed in, after Hill, with a petition for intervention by Ivey in order to provide a basis for retaining a claim of discrimination in promotion because he could find no actual claimant to discrimination in promotion among the plaintiffs in the existing or past labor force. He accordingly sought to identify Ivey, whose claim was one of demotion, not promotion, as a proper and typical representative of those employees of the defendant who had suffered discrimination in receiving promotion.

employed at the installations in issue since January 18, 1975. That number is insufficient under all the cases to support a class certification.

Professor Arthur Miller in his monograph, "An Overview of Federal Class Actions: Past, Present and Future," Federal Judicial Center Education & Training Series, (2d Ed. 1977) at 22, stated the following guideline as distilled from an exhaustive review of the cases on the numerosity requirement under Rule 23, Fed. R. Civ. Proc.:

> "If the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule and other factors, discussed below, become relevant."

Many of the decisions are more exacting than the guideline phrased by Professor Miller.[2] Thus, in Roman v. ESB, Inc., 550 F. 2d 1343 (4th Cir. 1976), we held that a proposed class consisting of 55 employees did not qualify under the numerosity requirement of Rule 23. Without, however, attempting to identify any exact number as meeting the numerosity requirement, it is well settled that one or two will not meet the numerosity test. We held this in Doctor v. Seaboard Coast Line R. Co., 540 F. 2d 699 (4th Cir. 1976).

The numerosity requirement is not established simply because there are a certain number of minority employees at work in a plant. There must be a showing of some kind that a sufficient number of those minority employees feel that they have been

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[2] For an exhaustive review of the decisions, see Connolly & Connolly, Qualifying Title VII Class Action Discrimination Suits: A Defendant's Perspective, 9 St. Mary's L.J. 181, 183-84, n. 11 (1977).

discriminated against by a denial of promotion in order to meet the numerosity requirement. This fact is illustrated by McCoy v. McLeroy, 348 F. Supp. 1034 (M.D. Ga. 1972). Involved in that case was the right of non-resident college students at the University of Georgia to vote. The number of students at the University totalled 18,000. There were, however, but two students who had claimed the desire to vote and been denied that right and there was no evidence that any other students had "attempted like individual plaintiffs to register and been refused." Id. at 1039. The court held that the numerosity requirement was not met. Again, in Wright v. Stone Container Corporation, 386 F. Supp. 890, 892 (E.D. Mo.), aff'd., 524 F. 2d 1058 (1975), a discrimination case, it was held that the action might not proceed as a class action "for the reason that no showing had been made of the specific claims of a sufficient number of those purported to be class members, as required by Federal Rule

of Civial Procedure 23(a), (1), (2) and (3)." And in a recent case from the Fifth Circuit, Davis v. Roadway Exp., Inc., 621 F. 2d 775, 776 (5th Cir. 1980), another discrimination case, the district court had initially granted class certification but, after notice, it had been "determined that only one of twenty three prospective class members indicated a desire to be a part of the class, whereas seventeen had specifically opted out and five had made no response whatever." The district court decertified the class certification because the "purported class lacked numerosity" and the Court of Appeals affirmed.

When, after all minority employees had been queried and only one asserted a claim of promotion discrimination (or two, if we assume that Ms. Ivey whose claim was discriminatory demotion is to be treated as a promotion discriminatee), what the district court should have done was what the

court did in Davis: It should have decertified the class certification for employees claiming promotion discrimination. This would have eliminated any class action aspect of this case. The district court, however, did not do this. With but a single promotion discriminatee the district court proceeded as if there were a valid class action with proper numerosity and used it as a vehicle to impose on the employer overwhelming regulatory requirements in connection with its promotion of employees. And what makes the ruling even more incomprehensive, all this relief is ordered on the assumption that Ms. Ivey is a representative of a class of employees who have suffered promotion discrimination. Ms. Ivey's claim is not one for discrimination in promotion but one for discriminatory demotion. Her claim is not thus typical of employees who may have been discriminated against in promotion. And this is particularly so because the district court in its "Memorandum of

Decision" found that such discrimination as it found Ms. Ivey had suffered did not "represent any general pattern, practice or policy." If hers was an isolated and personal act of discrimination, where is there a class of discriminatees of which she is typical? Certainly, one isolated case of discrimination in promotion or demotion (however Ivey's claim is described) which, by the court's own finding, doesn't represent a "pattern" or "practice" should not bring down on the employer's head the panoply of regulations suffered by this employer. And this should particularly be true where, as here, the court, after inviting all employees who might have a claim of discrimination in promotion to come forward, receives but a single meritless claim.

It may be just and appropriate to visit a bevy of regulations on a violator whose violations justify a finding of general practice or pattern

but it is, I submit, a misuse of judicial power to impose a whole set of burdensome regulations on an employer who has not been found to follow any general practice of discrimination. In fact, in this case, there is not one single proven instance of a denial by this defendant of promotion to anyone, black, white or yellow, on account of his race. To smack such an employer with the array of requirements set forth in this judgment lends credence to the criticism directed at the federal district courts and courts of appeals by Professor Fried in his column in The New York Times of November 10, 1981. In this article Professor Fried said:

> "Federal district judges are increasingly acting as day-to-day managers and implementors, reaching into the details of civil life. . . .
>
> "As judges determine the size and content of municipal budgets, large-scale hiring practices, the management of public institutions, the courts no longer stand merely as a veto on

excessive government interference in citizens' lives; instead, they become yet another form of government management of those lives. Thus, what the late Lon Fuller, professor of law at Harvard, identified as the forms and limits of adjudication are being regularly violated. 'The least dangerous branch,' going beyond the role of nag or naysayer, has become considerably more dangerous.

. . . .

"But there is an alternative conception that views the common law as a more or less stable structure of private rights and relations. That conception does offer a significant constraint on judicial power, for the judge conceives of himself as discerning the application of that structure to changing circumstances. This conception of the common law has been caricatured under the rubrics 'formation' or 'conceptualism.' That no mere verbal formula can generate answers in changing circumstances is too easy to prove, but an underlying conception of private relations and the relation of the individual to the state can indeed generate answers in a deep and interesting way.

"These diagnoses suggest their remedies: Not the episodic, anti-constitutional - if not unconstitutional - withdrawal of jurisdiction from the Supreme Court in particular controversial matters, but the general shrinking of

> lower Federal court jurisdiction to direct the day-to-day business of government through managerial decrees. Cutting class actions down to size is also in order, as these invite free-roaming, unfocused managerial decrees. But the final remedy lies in a re-affirmation of an older, and I think nobler conception of the law.
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> "It is encouraging that the best recent writing in moral and legal philosophy has abandoned sophomoric cynicism about the objectivity of values. The ultimate solution lies in the accession of judges who believe that law is more than just a continuation of politics by other means." (Emphasis added)

I would reverse the class action findings of the district court and remand with direction to dismiss.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1821

Shirley Brown and Dorothy Black and Almetta Ivey, individually and on behalf of all others similarly situated,

Appellees,

v.

Eckerd Drugs, Inc., a corporation now merged with Jack Eckerd Corporation, a corporation and Eckerd's Providence, Inc. (Store #4), a wholly-owned subsidiary of Eckerd Drugs, Inc., now merged with Jack Eckerd Corporation,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued November 11, 1980 Decided October 21, 1981

Before BUTZNER, RUSSELL, and MURNAGHAN, Circuit Judges.

John O. Pollard (Blakeney, Alexander & Machen on brief) for Appellant; Michael A. Sheely (Joyce M. Brooks, Shelley Blum on brief) for Appellee.

MURNAGHAN, Circuit Judge:

The present appeal stems from a class action suit filed in May, 1976, by plaintiffs Shirley Brown and Dorothy Black against Eckerd Drugs, Inc., charging discrimination in hiring, firing, promotion, job assignment, and geographical assignment at its Mecklenburg County facilities, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., and 42 U.S.C. Section 1981. Brown and Black complained, in addition to their class allegations, that each had been discriminatorily terminated. Although the class initially included rejected applicants for employment, as well as past and present employees, the district court, after our decision in Hill v. Western Electric Co., Inc., 596 F.2d 99 (4th Cir. 1979), cert. denied, 444 U.S. 929 (1979), excluded applicants from the class. After trial, Almetta Ivey, a member of the original class who had testified at trial that she was discriminatorily

demoted from a supervisory position, was permitted to intervene as a named plaintiff. After further modification, the class ultimately was defined as past and present employees who claimed that the defendant discriminated on the basis of race in connection with promotion or transfer to management and supervisory positions in the defendant's Mecklenburg facilities.

On the merits, the lower court found that the Company discriminated against the plaintiffs and their class. In addition, Brown and Ivey prevailed on their individual claims. Plaintiff Black, however, failed.[1] Accordingly, the court granted reinstatement and backpay to Brown and Ivey and enjoined those promotion and transfer practices found to discriminate against minorities.

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[1] No appeal was taken from the denial of Black's individual claim nor from the denial of individual relief to several other class members who presented claims at trial. Nor do the plaintiffs contest the various modifications of the class.

On appeal, the defendant contends that the original plaintiffs had no "standing" to represent a class concerning claims other than discriminatory discharge; that the district court erroneously permitted class member Ivey to intervene as a named plaintiff a year after trial; and that the individual and class claims of discrimination were not proved. On each issue we affirm the judgment of the district court.

Eckerd Drugs, Inc. and its successors ("Eckerd") have operated several retail stores and a warehouse from corporate offices in Mecklenburg County, North Carolina. The main office employs clerical, professional and management workers. The retail stores are run by a store manager and assistant manager, pharmacist, fountain manager, fountain personnel and sales personnel. The store managers report to district managers who are responsible for various stores. The work force at

the warehouse, located in the same facility as the main office, includes stockers, receiving and shipping clerks, checkers, and forklift and truck drivers.

The district court found that Eckerd's promotion and transfer policies, utilized at all facilities, were few: Eckerd maintained no job descriptions for supervisory positions, nor had it posted notices of managerial vacancies until 1978. There were no formal lines of progression into management or supervisory jobs. No written criteria have been utilized to determine the qualifications of a person to fill supervisory vacancies and the management representatives responsible for filling such positions, nearly all of whom are white, have had virtually complete discretion to fill the spots. Employees were evaluated only irregularly and evaluation has been undertaken from memory without benefit of written criteria. A "word of mouth" system has been

employed to notify employees of supervisory vacancies in other facilities. Before 1976, most supervisory personnel were white,[2] despite an employee work force composed of 14% blacks (34% blacks in the retail stores).

In September, 1974, plaintiff Shirley Brown was employed as a keypunch operator in the main office. In June, 1975, she left her job after several incidents evidencing racial bias. Plaintiff Dorothy Black, hired to work in a retail store, and subsequently promoted to fountain manager, was fired in 1975. Intervenor

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2 Before 1973 only one black (Dorothy Black) had been employed in a managerial capacity outside the warehouse. Except for Almetta Ivey, no black at the time of judgment had ever held a supervisory position in the main office. Of Eckerd's 97 supervisory positions in the main office and stores in 1975, 3 (3.09%) were occupied by black persons. Warehouse employees fared significantly better. In 1975, of the 158 workers in the warehouse, 43 (27.6%) were black. Of what were apparently 13 warehouse management or supervisory personnel that year, 3 (23)% were black.

Ivey was hired in 1969 to work in the main office. From 1975 until 1977 she supervised the third party receivables department. In June of 1977, she was demoted after training a white supervisor to take her place.

I.

Eckerd first contends that Brown failed to prove that she was discriminatorily discharged, and that Ivey did not show that she was discriminatorily demoted from a supervisory role. We have carefully examined the factual findings of the district court with respect to Brown and Ivey. Had we been sitting at the trial court, we might well have been inclined to find that Brown and Ivey did not sustain their burden of persuasion. On appeal, however, our function is the very restricted one of determining whether the district court's determination was clearly erroneous. Where there are conflicts in the testimony, we have kept in mind that the district

court is in the best position to evaluate the witnesses' credibility and resolve the conflicts. Upon examination of the evidence as a whole[3] and of the district court's findings of fact and law, we are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum, 333 U.S. 364, 395 (1948). We therefore affirm the judgments as to the individual claims.

The proper approach was outlined by the Supreme Court in Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). Burdine reaffirmed the doctrine that when a Title VII plaintiff has established a prima facie case, the burden of

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3 We emphasize the necessity to evaluate the plaintiff's prima facie case as a whole. To evaluate each piece of evidence seriatim, the practice followed in the dissent, would impose an impossible and improper burden on the plaintiff.

production, but not persuasion, shifts to the employer, who must show some legitimate, nondiscriminatory reason for the employment decision. Should the employer make that showing, the plaintiff, in order to prevail, has the burden of persuading the trier of fact that the employer's proffered reason was pretextual. The Court further stated that, once the employer has successfully rebutted the plaintiff's prima facie case, the evidence previously introduced by the plaintiff can be considered by the trier of fact on the issue of whether the employer's explanation is pretextual. In fact, "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." Id., slip op. at 7 n.10.

Having set forth briefly the applicable law, we now discuss in turn the Ivey and Brown claims.

A. Ivey Claim

Ms. Ivey was first hired by the defendant in 1969 as an accounts payable clerk in its main office. At that time she was the only black employee in a supervisory position. In April, 1976, she was appointed supervisor of a new department, third party receivables. Both the plaintiff's prima facie case and the defendant's rebuttal rely on the details of her occupation of that position until she was replaced by a white woman in June, 1977.

Ms. Ivey's performance was neither outstanding nor inadequate. On several occasions, as late as May, 1977, her supervisor, Mr. Dale Whitworth, told her that she was doing a good job, and that he felt she could run the department. He also told her, however, on two occasions that he was not sufficiently satisfied with her performance to give her a pay raise. His specific criticisms were threefold.

First, Mr. Whitworth had received complaints that too much noise was coming from the department. Ms. Ivey told him that one employee in particular was responsible for the noise, and that the employee, who was the sister-in-law of Mr. Whitworth's secretary, refused to listen to Ms. Ivey. Mr. Whitworth neither fired the employee nor gave Ms. Ivey the authority to fire her. Rather, he said he would talk to her, and told Ms. Ivey that she was responsible for controlling her employees. His lack of effective support contrasts sharply with a similar situation involving a white supervisor of the other plaintiff, Brown, in which management provided strong support for the supervisor. See pp. 11-12 infra.

Second, on one occasion when Ms. Ivey was absent from the office, Mr. Whitworth found in her desk unfinished work, including checks which had not been deposited. When she returned to work, Mr. Whitworth asked her about the unfinished

matters, and she responded that her department was overworked and understaffed. During the time Ms. Ivey ran the department there were never more than three employees, as compared with the five or six Mr. Whitworth promised when he offered her the supervisory position.

Finally, Ms. Ivey was unable to prepare the "outstanding balance reports" which she was supposed to file each month. Again, she attributed the failure to lack of staff, and Mr. Whitworth was sufficiently persuaded by her explanation to agree in May, 1977 that he would meet with her in July to review her performance, and that she should prepare an outstanding balance report by then. At the same time he reiterated that her performance was good and that he felt she was capable of running the department.

Against that background, two weeks after he expressed confidence in Ms. Ivey, and well before

the July, 1977 deadline for an outstanding balance report, Mr. Whitworth informed Ms. Ivey that she was being replaced as supervisor by Marilyn Wilkes, a white woman. Ms. Ivey helped train her replacement to the extent of explaining the department's workings. Mr. Whitworth gave no explanation for the demotion beyond the general statement that he felt she could not handle the department, contrary to his confidence of two weeks earlier. At trial he testified that Eckerd was planning to adopt a new, more sophisticated system for controlling third party receivables, and that he did not believe Ms. Ivey could handle the new system.

From these facts, the district court was justified in concluding that the plaintiff had established a prima facie case of discrimination against Eckerd. When hired, Ms. Ivey was the only black in the main office. As late as 1975,

only 7.4% of all employees in the main office were black. She was treated less favorably than a white supervisor when she encountered problems with a subordinate. Finally, she was replaced by a white person despite her superior's recently expressed confidence in her. The district court's finding that Ms. Ivey established a prima facie case was correct.

The next step in the Burdine analysis is the employer's rebuttal. Eckerd met its burden to rebut Ms. Ivey's prima facie case. Eckerd showed that Ms. Ivey was unable to control her department's noise level, that she left uncompleted work while she was on vacation, and that she failed to provide monthly reports in a timely fashion. Taken together, those deficiencies could comprise legitimate and non-discriminatory grounds to demote Ms. Ivey.

In response to Eckerd's rebuttal, Ms. Ivey was entitled to show that the proffered ground was not in fact the reason for demotion, but was merely a pretext. She offered no additional evidence to make that showing, but additional evidence is not required. The present case falls within the realm of Burdine's footnote 10, p. 6 supra. Taking together all of the evidence which comprised the plaintiff's prima facie case and the defendant's rebuttal one might reasonably conclude, even without any additional evidence from the plaintiff, that the deficiencies in Ms. Ivey's performance was beyond her control, that Mr. Whitworth was aware of that fact, and that he fired her, at least in part, because she was black. Judge McMillan reached that conclusion. Alternatively, one might conclude that the deficiencies were the sole reason for her dismissal. On appeal, we need not --

indeed, may not -- choose between the two, because the district court's conclusion was not clearly erroneous and, therefore, must be accepted.

The dissent is correct to identify language in the district court opinion which is subject to criticism. The bald statement that Eckerd failed to rebut the prima facie case is difficult to reconcile with the evidence. Furthermore, the court's expressed requirement that the defendant show Ms. Ivey's replacement was as qualified as, or more qualified than, Ms. Ivey does not follow Burdine. However, the district court found as a fact that race was one reason for the demotion of Ms. Ivey, and its finding was amply supported by the evidence. We therefore affirm the court's ruling as to Ms. Ivey.

B. Brown Claim

Ms. Brown was employed as a keypunch

operator in the defendant's main office until June 3, 1975. Her claim is predicated on the theory of "constructive discharge." In order to make out a prima facie case of constructive discharge, the plaintiff must show by a preponderance of the evidence that she was forced to quit her employment by intolerable working conditions imposed on her by her employer, who was motivated in such imposition by racial or sex bias. See, e.g., J. P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Here, the prima facie case rests on events which occurred at a conference held on June 3, 1975, as well as several earlier events.

First, a white employee who shared Ms. Brown's work station repeatedly bumped into her chair, in a manner Ms. Brown believed to be deliberate. The bumping was particularly uncomfortable because Ms. Brown had recently

given birth to a child by caesarean section. On several occasions, Ms. Brown requested that her supervisor, Penny Hart, change her work station, but Ms. Hart refused, although there were vacant work stations at the time. She said that she expected to make a complete reassignment of work stations in the department, and would reassign Ms. Brown at that time. Ms. Brown, believing her work situation intolerable, then spoke to Mel Harvey, who she believed had authority to make the change immediately. Mr. Harvey referred her to Mr. Straughn, Ms. Hart's supervisor, and Mr. Straughn refused to make a change. He stated that such matters were within Ms. Hart's discretion. Ms. Brown responded that she would not "put out a hundred percent." When Mr. Straughn told her to "put out a hundred percent or else," Ms. Brown replied that she would do her

best, but didn't think it possible to function at full efficiency under such circumstances. Her work station was finally changed three weeks after her initial request.

Taken alone, this incident could be seen as an employer's reasonable response to an employee's insubordination. The district court, however, found that the work station unpleasantness was one of many incidents which, when taken together, made Ms. Brown's working conditions intolerable. It is certainly plausible on the district judge's part to conclude that, when a white employee repeatedly bumps a black employee, who has recently undergone surgery, and management fails to take immediate action to remedy the situation, the employer is acting to make the black employee's conditions of employment intolerable because of her race.

Second, Ms. Brown testified that on June 2, 1975, she observed Mr. Straughn and others watching her work, and that, when she passed within hearing distance she heard Mr. Straughn use the term "nigger". Eckerd emphasizes that on no other occasion did anyone use racially objectionable language in Ms. Brown's presence. However, this incident, like the first, is probative of the working conditions imposed on Ms. Brown, and the racial bias of her superior. It is relevant to, although not dispositive of, the issue of constructive discharge, and the district court was entitled to take it into consideration.

Third, Ms. Brown testified that, when she returned from her maternity leave, she was told that no changes in the computer format had been made, but in fact there had been substantial changes, which rendered it impossible for her to

work effectively. Ms. Brown testified that she requested assistance from Ms. Hart, and that her request was refused. Ms. Hart denied having received any such request. The district court, which had the benefit of observing the witnesses' demeanor as they testified, found that such a request was made, and that finding comprises the third component of the prima facie case. Again we might have found differently than the trial judge, but the evidence was there to support his conclusion, which must be accepted since it was not clearly erroneous.

Finally, the events which occurred during the meeting on June 3, 1975 between Ms. Brown and her supervisors compose the final evidence in the prima facie case. Present at the meeting were Ms. Brown, Ms. Hart, Mr. Straughn, and a personnel representative, Glenda Hanner. Ms. Brown was questioned about her high rate of absenteeism,

which she attributed to her difficult pregnancy, and her child's illnesses. She was asked to improve her attendance and, she testified, to promise not to be absent at all in the future. She promised to try to improve her attendance in the future.

More important than the substance of the meeting was its tone. Ms. Hanner acted as an "interpreter" for Ms. Brown. Ms. Brown testified, "They would ask me something and I would give the answer to it and Glenda would rephrase my answer using bigger terminology, you know, I guess so they could understand better." When Ms. Hanner took the side of Mr. Straughn and Ms. Hart on some matters, racial accusations became more open. Ms. Brown said Ms. Hanner claimed she didn't know there was any black-white dispute. Mr. Straughn addressed Ms. Brown as "girl", while pointing his finger in her face, and

Ms. Hart called her a "fool". Ms. Brown then asked that a black employee be brought into the meeting, but her request was denied, so she refused to talk further. Ms. Hanner suggested that Ms. Brown might be happier working elsewhere, and, Ms. Brown testified, Ms. Hart told her she was fired. She then went out to the company parking lot, and Mr. Straughn there told her to leave the premises.

From this evidence it is clear that Ms. Brown established a prima facie case of constructive discharge. She was treated rudely by a white employee, and not supported by management. It appeared she was called a "nigger" by the highest official with whom she had contact. Her supervisor refused to assist her when the computer format was changed during her maternity leave. Finally, during a conference with supervisors, she was dealt with in a condescending

and abusive manner which the district judge could properly find to be suggestive of racial animosity. Her sentences were "translated" by a white person, she was addressed as "girl," and she was called a "fool," before being ordered off the premises. The district court found, with substantial support, that the employer made her working conditions intolerable, that it did so in order to force her to quit, and that its motivation was, at least in part, racial.

Again Eckerd offered enough evidence to rebut the prima facie case. The refusal to reassign Ms. Brown to a new station may have been mere compliance with a sensible departmental practice. Her supervisor may not have refused to assist her, if the supervisor's testimony is believed. The condescending behavior at the meeting may, as Eckerd claims, have been Ms. Brown's irrational perception due to her anger.

In sum, Ms. Brown may have been properly discharged because of her insubordination at the meeting.

However, even granting that Eckerd offered sufficient proof of facts to demonstrate a legitimate reason for Ms. Brown's constructive discharge, it was the district court's role to evaluate all of the evidence in order to determine whether the reason advanced was a pretext. Here, again, the plaintiff was not required, under Burdine, to introduce new evidence to show that the employer's legitimate reason was a pretext. Looking at all the evidence, one might reasonably conclude that the employer deliberately harassed Ms. Brown until it succeeded in prevailing on her to quit, and that the motivation was racial bias. That was the conclusion the district court reached. A rejection of the finding would constitute an impermissible crossing of the

boundary line between what an appellate court may do and what falls within the trial court's ambit. We must affirm the district court, because its view was not clearly erroneous.

II.

Eckerd also contends that Brown, Black, and Ivey were not "appropriate" representatives of the class under Hill v. Western Electric, supra, 596 F.2d 99, because the named representatives suffered injury "different" than that of members of the class.[4] Since the class in this case ultimately

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4 The defendant does not contend that Brown, who worked in the main office, and Black, who worked in a retail store, are, simply on geographical grounds, ineligible to represent warehouse employees complaining of exclusion from supervising positions. See Hill v. Western Electric, supra, 596 F.2d at 102-03. But see Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), cert. denied, 429 U.S. 920 (1976) (two plants of same employer treated as single facility for purpose of class action representation). We note, in any event, that the relevant labor market for supervisory positions in all three operations was comparable.

included just employees at the defendant's main office, warehouse, and several of its retail stores who complained of failure to promote or transfer into management and supervisory jobs, we consider Eckerd's argument only in relation to the final class definition. Moreover, since we hold that Brown and Black were at all times appropriate representatives of the indicated class, we have no occasion to address the issue of whether Ivey's post-trial intervention cured any asserted certification defect based on the contention that Brown and Black lacked "standing" under Rule 23(a) to represent the class.

In Hill, we held, in the circumstances of that case, that an employee, who had been hired, could not represent a class that included persons who were denied employment altogether. However, Hill did not preclude an employee who suffers some particularized employment discrimination grievance

from representing other employees who present factually differing claims that, nevertheless, proceed on the same legal theory of race discrimination.[5] Barnett v. W. T. Grant Co., 518 F.2d 543 (4th) Cir. 1975); cf. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977). As stated by the court in Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977), "[w]hen the claim

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5 That Brown and Black are former employees does not affect their capacity to represent current employees. See Jenkins v. Blue Cross Mutual Hosp. Ins., Inc., 538 F.2d 164, 169 (7th Cir. 1976) (en banc), cert. denied, 429 U.S. 986 (1976); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975). Cf. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (former prisoner no longer subject to Parole Commission guidelines has standing to appeal denial of class certification).

arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." See also Gibson v. Local 40, Supercargoes and Checkers of the International Longshoremen's and Warehousemen's Union, 543 F.2d 1259, 1264 (9th Cir. 1976); Russell v. American Tobacco Co., 528 F.2d 357, 365 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Crockett v. Green, 534 F.2d 715 (7th Cir. 1976).[6]

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6 Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980), cert. denied, ___ U.S. ___, 68 L. Ed. 304 (1981), does not alter the Seventh Circuit's support for broad Rule 23 standing where an employee raises complaints about general employment practices that affect other employees -- past, present or potential -- as well as himself. See, e.g., Crockett, supra, 534 F.2d 715. In Patterson, the complaint alleged facts that "relate[d] solely to plaintiff's personal grievances," and the appeals court held that where such a plaintiff "has simply asserted no facts relating to other members of the purported class," the district court's denial of class certification was not an abuse of discretion. 631 F.2d at 480-81 (emphasis in original).

Where an employee presents a particularized claim of racial injury, she may represent a class of other employees in bringing a general challenge to workplace discrimination. Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir. 1978), cert. denied, 439 U.S. 835 (1978); Donaldson v. Pillsbury Co., supra, 554, F.2d at 830-31; Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976). The nature of employment discrimination injury is such that all minority employees suffer similar injury when unlawful practices governing the conditions of their workplace either perpetuate a discriminatory work environment or subject them to a substantial risk that they will be denied employment benefits in the future on account of their ract. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208-09 (1972) (two tenants, one black and one white, are "persons aggrieved" under

Title VIII of the Civil Rights Act of 1968 when their landlord discriminates against nonwhites in the rental of apartments); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 111-15 (1979) (deprivation of benefits of interracial associations constitutes sufficient injury to accord plaintiffs' constitutional standing); Coles v. Havens Realty Corp., 633 F.2d 384, 388-90 (4th Cir. 1980), cert. granted, ___ U.S. ___, 68 L. Ed. 2d 293 (1981) (named representatives of a class challenging racially discriminatory "steering" practices of the defendant realty companies suffered injury to their interest in "living in integrated communities free from discriminatory housing practices"); Rogers v. Equal Employment Opp. Comm'n, 454 F.2d 234, 237-39 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972) (Goldberg, J.) (employee may challenge discriminatory work environment created by segregation of patients); Waters

v. Heublein, Inc., 547 F.2d 466, 469-70 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977) (white employee has standing to sue employer who discriminates against minorities since she has statutory right to work environment free of racial prejudice). All employees of a firm that allegedly discriminates in promotions have an identical interest in obtaining declaratory and injunctive relief against the perpetuation of the challenged practices. Therefore, quite apart from any possibility of sharing in classwide damages as to practices to which the named representative alleges no particularized individual claim, employee representatives share interests of a kind with other employees in redressing racially discriminatory employment practices that either pollute their working environment or else threaten them with harm in the foreseeable future.

Additionally, we note that class members -- including named representatives -- who have not applied for a promotion may nevertheless be eligible to share in any monetary relief awarded the class provided each can demonstrate that she would have applied for promotion but for the defendant's discriminatory promotion practices. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 362-68 (1977). In the typical Title VII bifurcated trial, which splits the liability stage (and, consequently, all class certification decisions) from the remedial stage, a putative representative's possible eligibility for sharing in any class relief will not, in the normal course of affairs, be known until after his or her eligibility to litigate class claims has been determined. That the Supreme Court anticipates the possibility of obtaining such relief in the remedial stage

underscores our conclusion that Brown and Black have, indeed, been personally injured by the practice they challenge.

Under these standards, Brown and Black are entirely appropriate representatives. At the time of certification, each could show that, in addition to her individual claim of discriminatory dismissal, she labored under the allegedly discriminatory promotion practices of the defendant.[7] Each of the named plaintiffs, the district

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7 Although plaintiff Black failed at trial to prove her individual claim, her loss does not moot or destroy the class claims. As the Supreme Court has stated:

> Obviously, a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, provided the initial certification was proper and decertification not appropriate, the

Footnote 7 continued

> claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 752-757 (1976); Moss v. Lane Co., 471 F.2d 853, 855-856 (CA4). Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "there [are] involved none of the imponderables that make the [class action] decision so difficult early in litigation." 505 F. 2d at 51. See also Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15-16 (CA4).

East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 406 n.12 (1977). In addition, the Supreme Court has recently held that the expiration of a named plaintiff's individual claim does not moot or destroy putative class claims, and that such a plaintiff has standing to appeal a denial of class certification. United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). See Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978)(en banc) (holding that named plaintiff who lost her individual Title VII claim on the merits before class certification could not represent the putative class), vacated and remanded, 445 U.S. 940 (1980), on remand 634 F.2d 231 (5th Cir. 1981) (en banc).

court found, worked in a system in which virtually none of the supervisors were black or minority. Indeed, the one black supervisor in the main office, Almetta Ivey, had been demoted from her supervisory position. As employees allegedly injured by the Company's maintenance of a hierarchically segregated work environment supervised by a largely white managerial staff,[8] therefore, Brown and Black were proper parties under Hill and Barnett to represent an employee class challenging employment practices that generally affected minority employees adversely.

Moreover, if successful on their individual claims and reinstated, each named plaintiff, at the time of certification, could anticipate that she would once again be subjected to Eckerd's discriminatory promotion practices. Eckerd's

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8 See note 2, supra.

failure to post notices of or provide job descriptions for supervisory vacancies, its reliance on word-of-mouth notice of vacancies, its lack of regularized objective means of employee evaluation, the absence of objective criteria governing promotions into supervisory positions, and its complete reliance on managerial discretion in making promotion decisions are classic means by which minorities are locked into static positions. Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382-83 (4th Cir. 1972), cert. denied, 409 U.S. 982 (1972); Barnett v. W. T. Grant Co., supra, 518 F.2d at 549-50; Rock v. Norfolk & Western Ry., 473 F.2d 1344 (4th Cir. 1973), cert. denied, 412 U.S. 933 (1973); Rowe v. General Motors Corp., 457 F.2d 348, 358-59 (5th Cir. 1972). At the time of certification, therefore, Brown and Black could show that, in addition to their particularized

claims of discriminatory dismissal, each was injured by discriminatory promotion practices. See Rodriguez, supra, 431 U.S. at 403. Therefore, Brown and Black were appropriate representatives of an employee class at all relevant times during the litigation. See generally, Note, Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 Yale L.J. 868 (1979); Note, The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez, 13 Harv. C.R.-C.L. L. Rev. 175 (1978).

III.

Eckerd maintains that the district court erred when it allowed class member Almetta Ivey to intervene after trial as a named plaintiff. The contention is without merit.

The district court permitted Ms. Ivey to intervene both as of right, Fed. R. Civ. P. 24(a),[9] and pursuant to trial court discretion, Fed. R. Civ. P. 24(b).[10] Since we perceive no abuse of discretion under Rule 24(b), we do not decide whether

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9 Fed. R. Civ. P. 24(a):

> Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

10 Fed R. Civ. P. 24(b):

> Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim

Ivey, as a class member, had a right to intervene. It is enough that the district court had a discretionary power to permit her intervention.

Rule 24(b) provides that a district court may allow intervention by "anyone" when the "applicant's claim or defense and the main action have a question of law or fact in common." Here, in her complaint, Ms. Ivey contended that she was

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Footnote 10 continued

> or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

demoted from a supervisory position on account of her race. Certainly, since she was already a class member, her claim presented issues of law and fact in common with those of the class. See generally 7A Wright and Miller, Federal Prac. & Proc. Sections 1911, 1916 (1972 & 1981 Supp.). In addition, Fed. R. Civ. P. 23(d)(2) and (3)[11] expressly anticipate that class members may wish

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11 Fed. R. Civ. P. 23(d):

> Orders in Conduct of Action. In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; . . . .

to intervene as named parties. The defendant has not suggested that it was prejudiced by Ivey's intervention as a named plaintiff a year after the trial. Indeed, since her claim had been presented at the trial, it would be difficult for the defendant to suggest that her metamorphosis into a named plaintiff worked to its detriment.[12] See Muskelly v. Warner & Swasey Co., ___ F.2d ___, No. 80-1872 (4th Cir., June 25, 1981) (class member permitted to intervene after trial as named representative). Therefore, we conclude that the decision to allow Ivey to

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12 Nor can Eckerd complain that Ivey failed to exhaust Equal Employment Opportunity Commission (EEOC) administrative procedures. Eckerd received notice of EEOC charges filed by Brown and Black prior to the commencement of the litigation. Brown's and Black's charges included complaints about the defendant's practices concerning hiring, assignment, promotion, and geographical assignment, among other employment practices.

intervene was proper, and that her actual intervention in the litigation after trial was timely. See United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (allowing class member to intervene after judgment for purpose of appealing denial of class certification); Wheeler v. American Home Products Corporation, supra, 563 F.2d 1233; McDonald v. E. J. Lavino Co., 430 F.2d 1065 (5th Cir. 1970) (intervention after judgment allowed).

Footnote 12 continued

Their charges encompassed Ivey's individual complaint. It is not necessary that each class member, named plaintiff, or intervenor file charges with the EEOC. See Wheeler v. American Home Products Corporation, 563 F.2d 1233, 1238-40 (5th Cir. 1977) ("If back pay may properly be awarded in a class action to members of a class [who] do not meet the jurisdictional requisites, there seems no reason, in an action not a class action, to deny back pay to intervenors who do not meet the jurisdictional requisites"); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). In any event, Ms. Ivey filed an EEOC charge on June 23, 1977, and received a right to sue letter on April 29, 1979, her petition to intervene was granted on July 26, 1979.

IV.

Having carefully reviewed the remainder of defendant's contentions, including the sufficiency of proof on the class claims, we find no error.

AFFIRMED.

RUSSELL, CIRCUIT JUDGE, DISSENTING:

I dissent.

I first address the individual claims of the class members. In so doing, it is necessary only to consider the charges made by Ms. Brown and Ms. Ivey,[1] since all other claims by individual members were dismissed on their merits and there is no appeal from such dismissal.

I.

The flaw in the disposition of both the Brown and the Ivey charges is the failure of the

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[1] For the moment, I am disregarding the obvious fact that Ms. Ivey's claim is not within the class certified by the District Court. The plaintiffs' counsel recognized this and sought by an untimely attempt to correct it with a motion to permit the filing of an amended complaint in favor of Ms. Ivey. For reasons later discussed in connection with the class certification, I think Ms. Ivey's claim should be dismissed on that ground, too.

District Court to apply the Burdine burden of proof rule in disposing of these claims.[2] Under Burdine, the plaintiff has "[t]he burden of establishing a prima facie case," which the Court declared was not an "onerous" burden.[3] If the plaintiff establishes such prima facie case, the burden shifts to the employer "to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See Sweeney, supra, at 25 [439 U.S.].

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[2]Texas Dept. of Community Affairs v. Burdine, ___ U.S. ___, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). For a subsequent decision applying Burdine, see Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

[3]Slip opinion p. 5.

It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.[4] Specifically, this burden imposed at this point on the employer is not "to introduce evidence, which, in the absence of any pretext, would persuade the trier of fact that the employment action was lawful" (Emphasis the Court's), but only to "articulate lawful reasons for the action."[5] More important, for purposes of this case, the employer is not required "to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff." (Emphasis added)[6] In fact, one of the actual grounds for

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[4] Slip opinion p. 6.

[5] Slip opinion p. 9.

[6] Slip opinion p. 10.

reversal in Burdine was the error of the Court of Appeals in imposing on the employer the burden of proving by objective evidence that those hired or promoted were better qualified than the plaintiff.[7] When the employer has met this burden of

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[7] The actual language of the Court of Appeals, which was disapproved by the Supreme Court, is quoted in note 11 of the Supreme Court's opinion. Slip opinion p. 8:

> "'The court reviewed the defendant's evidence and explained its deficiency:
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> "'Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that must be alleviated by Burdine's discharge. Nothing in the record indicates whether

articulating (not persuading) a lawful reason for his act, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[8] (Emphasis added) To prevail, then, the plaintiff must "demonstrate that the proffered reason was not the true reason for the employment decision," but was discriminatory, and here the burden of persuasion rests on the plaintiff.[9]

Footnote 7 continued

> he examined Walz' ability to work well with others. This court in East found such unsubstantiated assertions of 'qualification' and 'prior work record' insufficient absent data that will allow a true comparison of the individuals hired and rejected. 608 F.2d at 568."

[8] Slip opinion p. 7.

[9] Slip opinion p. 7.

In neither the Brown nor the Ivey case did the District Court follow this plainly marked procedure as mandated by Burdine. The decision below in these cases should be reversed or, at least, remanded for further action in the light of the standards declared in Burdine, which actually were not new but were simply a clearer reaffirmation of the prior decisions in Sweeney,[10] Waters,[11] and even McDonnell Douglas,[12] as we recognized in Ambush v. Montgomery Cty. Government, Etc., 620 F.2d 1048, 1052 (4th Cir. 1980) and, as several District Courts in this Circuit have recognized, Day v. Patapsco & Back Rivers R. Co.,

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[10] Board of Trustees v. Sweeney, 439 U.S. 24, 25 (1978).

[11] Furnco Construction Corp. v. Waters, 438 U.S. 567, 579-80 (1978).

[12] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-01 (1973)

504 F. Supp. 1301, 1311 (D. Md. 1981); Cussler v. University of Maryland, 430 F. Supp. 602, 605 (D. Md. 1977). In so reversing or remanding, we would be following the well reasoned opinion of Judge Friendly in Ste. Marie v. Eastern R. Ass'n, 650 F.2d 395 (2d Cir. 1981).

In Ste. Marie the charge was sex discrimination "in appointments to technical and managerial positions." The District Court, as here, found in favor of the plaintiff and her class. In reversing, the Court said:

> "The overarching reason why the decision must be reversed is that the judge, having concluded, perhaps wrongly, that plaintiff had established a prima facie case, proceeded on the basis of a clearly improper standard as to the burden thereby placed on the defendant. He stated, 458 F. Supp. at 1165, that the establishment of a prima facie case of sex discrimination 'the burden shifted to the defendant to rebut plaintiff's case, and its failure to do so compels the conclusion that its policies and practices violate the Act.'

"This was error. It has been clear ever since McDonnell Douglas, supra, 411 U.S. at 802, 93 S.Ct. at 1824, that the burden that is shifted to the defendant by plaintiff's making out a prima facie case of disparate treatment--a task described in Burdine as 'not onerous', ___ U.S. at ___, 101 S.Ct. at 1093--is not a burden of persuading the trier of a business necessity to employ or promote a person belonging to the majority. The shifted burden is simply 'to articulate some legitimate, nondiscriminatory reason for the [minority] employee's rejection.' 411 U.S. at 802, 93 S.Ct. at 1824. This follows necessarily from the language and purpose of Title VII. The employer is not required to hire or promote a minority employee; rather he is forbidden to refuse to hire or promote such an employee because of race or sex. Hence he sufficiently rebuts a prima facie case by pointing to a business reason for his employment decision. By doing this he adequately negates, for the time being, the force of a plaintiff's initial showing that a qualified minority employee was denied employment or promotion which was given a majority employee instead. The plaintiff then has the burden 'to show that [the] stated reason . . . was in fact pretext,' 411 U.S. at 804, 93 S. Ct. at 1825, or, as later phrased, id. at 805, 93 S. Ct. at 1826, 'that the presumptively valid reasons' for failure to hire or promote 'were in fact a coverup for a racially [here sexually] discriminatory decision.'

> Justice Powell's recent opinion in Burdine, supra, simply elaborates in a helpful fashion on the theme sufficiently sounded eight years ago in McDonnell Douglas from which the Court has never deviated. The district court's conclusion that defendants had followed a pattern and practice of disparate treatment must therefore fail as based on an erroneous allocation of the burden of proof." [13]

II.

Turning first to the Ivey claim: At the outset, it is to be noted that the district court's decision sustaining Ms. Ivey's racial discrimination claim is fatally flawed by two critical errors of law. That the district court, in analyzing the facts as a basis for its final conclusions, utilized these erroneous legal standards cannot be disputed. These legal errors--both vital in the factual

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[13] 650 F.2d at 398-99.

The same result was reached in Daye v. Harris, 655 F.2d 258 (D.C.Cir. 1981).

analysis of the claim-- are plain and obvious in the opinion itself. Indeed, the majority concedes that such decision is contrary to the recent decision of the Supreme Court in Burdine in two in two vital particulars. Nor could it hardly have done otherwise. The first of such errors, which related to the burden of proof in this discriminatory treatment case, is, in the words of the majority, "difficult to reconcile with the evidence." The majority might more accurately have said that it was impossible "to reconcile" the district court's ruling on the burden of proof with the law, as declared in Burdine, for such is the plain fact as the majority recognizes by making no effort to "reconcile" the decision of the district court with the evidence. The second error imposed improperly on the defendant a "requirement that the defendant show that Ms. Ivey's replacement was as qualified as, or more qualified than,

Ms. Ivey." The majority candidly acknowledges that the district court, in so holding, did "not follow Burdine." The majority, however, blandly dismisses these admitted violations of the rules declared in Burdine by declaring, applying the clearly erroneous rule (" . . . our function is the very restricted one of determining whether the district court's determination was clearly erroneous"), simply that "the district court found as a fact that race was one reason for the demotion of Ms. Ivey, and its finding was amply supported by the record."

Such a "brush-off" of the flagrant violations of Burdine by the district court in reaching its decision disregards the fact that the very finding and conclusions it affirms (i.e., "that race was one reason for the demotion") was arrived at by the district court only as a result of a factual analysis of Ms. Ivey's claim made on the

basis of the district court's erroneous legal rules on burden of proof and on the necessity of the defendant's establishing that Ms. Ivey's replacement was better qualified than Ms. Ivey. These two rulings, both concededly erroneous, lie at the very heart of the district court's finding "that race was one reason" for Ms. Ivey's demotion. Critical legal errors-- errors such as the two here, which can be decisive in the result reached by the court, are not to be dismissed as the majority has done by a routine incantation of the clearly erroneous rule. Since the finding that Ms. Ivey's demotion was racially motivated as arrived at by an application of what it must be admitted were two critical errors of law, the majority errs in assuming that the proper standard of review is, the clearly erroneous rule. This was made quite clear in our decision in Owen v. Commercial Union Fire Ins. Co., 211 F.2d 488, 489

(4th Cir. 1954) where we said:

> "The trial judge held that the burden of proof rested upon the plaintiff 'to prove, by the weight of the credible evidence, that he has not been guilty of wilfully concealing or misrepresenting any material fact or circumstance'. This was clearly erroneous. The burden of proof rested upon the defendant to establish the fraud alleged. (citing cases) And we think that the error is of such a nature that we should vacate the judgment and remand the case for further hearing. The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact, such as mistake as to the burden of proof."

We restated this same principle in Piedmont Minerals Company v. United States, 429 F.2d 560, 562, n. 4 (4th Cir. 1970):

> "To be sure, in making this determination of fact the district court must apply relevant legal principles, and a factual determination made in disregard of the applicable principles of law, or made through gross overemphasis on one relevant principle to the exclusion of others, will be

> reversed because of the application of an improper legal standard. This is not the case here."

In so ruling, we were following the rule adopted universally in federal courts, and applied as well in Title VII cases as in other types of cases. Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 422 (5th Cir. 1980); United States v. Texas Ed. Agcy., Etc., 564 F.2d 162, reh. denied, 579 F.2d 910 (5th Cir.), cert. denied, 443 U.S. 915 (1979); Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374, 1382 (5th Cir.), cert. denied, 441 U.S. 968 (1979); Rowe v. General Motors Corporation, 457 F.2d 348, 356, n. 15 (5th Cir. 1972); Ammerman v. Miller, 488 F.2d 1285, 1300 (D.C. Cir. 1973).[14] Moreover, it was the rule adopted and

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[14] In Rowe v. General Motors Corporation, 457 F.2d at 356, n. 15, the Court said:

> "GM argues that the sole consideration for this Court is whether or not

and followed by the Supreme Court itself in Burdine, see note 12, p. 11, slip opinion. If this rule is applied, there is no escape from a reversal of the decision of the District Court.

The factual record of the Ivey claim clearly sustains the foregoing conclusions.

Footnote 14 continued

> the factual findings of the Trial Court were clearly erroneous under F.R.Civ.P. 52 (a). But as we have so often pointed out, Ferran v. Flemming, 5 Cir., 1961, 293 F. 2d 568; United States v. Pickett's Food Service, 5 Cir., 1966, 360 F.2d 338; Dilworth v. Riner, 5 Cir., 343 F.2d 226, and just so recently emphasized in a Title VII case, United States v. Jacksonville Terminal Co., supra, 451 F.2d at 423-424, this does not apply to findings made under an erroneous view of controlling legal principles."

For recent Title VII cases, applying the same rule, see Johnson v. Uncle Ben's, Inc., supra, and Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1372, n. 20 (5th Cir. 1974).

Ms. Ivey, the claimant, was initially employed by the defendant in 1969 in its main office. In December, 1975, when a new department (third party receivables) was created, she, a black, was made supervisor of that department. She was relieved as supervisor in June, 1977 (without any reduction in salary) and replaced by Marilyn Wilkes, a white. That may well have been sufficient, under the liberal rule for establishing a prima facie case as formulated in Burdine, to make out a prima facie case of racial discrimination. See Lindsey v. Miss. Research & Development Center, 652 F.2d 488, 491 (5th Cir. 1981). For purposes of this discussion, I shall accept that conclusion. But, under the Burdine standard, that only shifted the burden to the defendant to "articulate lawful reasons for the action;" it certainly did not impose on the defendant any burden of persuasion or of rebutting the prima

facie case. And the defendant did precisely meet its burden of articulating "lawful reasons" for its demotion of Ms. Ivey and that in overwhelming detail.

In so doing, the defendant began by establishing that almost from the outset, the department was not understaffed racially. Of its four employees, two were black and two white.[15] The two black employees at the beginning were the claimant Ivey and Teresa Hasty. When Teresa Hasty quit to return to school in Texas, Morris Abraham, also black was transferred into the department. Neither did the defendant seek to discriminate against blacks in the selection of the manager of the department. Ms. Ivey, a black, was chosen by

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[15] Blacks represented a larger proportion of the employees in the department than their proportion in the Charlotte population area.

Whitworth, the officer under whom the department operated, as the new department's supervisor. She retained that position from December, 1975 to June, 1977.

The function of the new department was the establishment of a control system over what the defendant described as "third party receivables", i.e., claims for payment for prescriptions not from the person presenting the prescription but from "third parties", such as an insurance company. The operation of the new department was phased in gradually over a period of some months until it covered all the stores in the chain. One of the specific and important duties of the supervisor of the department was the preparation of an "outstanding balance report that she was supposed to present to [her superior] monthly." This report was not an elaborate or complicated report; to prepare it merely required the collection of "each

one of the pages for each one of the stores at the end of the month and combin[ing them into] the totals." According to the defendant's undisputed testimony, the plaintiff Ivey, though she was the supervisor charged with the responsibility of preparing these monthly reports, did not prepare or file a single monthly report in the months between her appointment as a supervisor in December, 1975 and her demotion in June, 1977. She was repeatedly requested during this time to furnish such report. Her reply was always that she was "working on the report." Whitworth, her superior, repeatedly and with unusual patience, extended time to her for preparing the reports.

From sometime in September, 1976, Ms. Ivey was on sick leave for ten weeks. In this period, the defendant offered testimony that it began to receive reports "about certain things that had not been done" by Ms. Ivey. Whitworth checked through

Ms. Ivey's desk. He found "various things such as checks that were not deposited, dating back some four to five months; . . . rejected claims that had not been reprocessed, had not been sent back to the stores; . . . inquiries from managers that had not been answered . . . several instances where checks had been deposited in total without any breakdown as to what stores . . . could not support the breakdown on the spread sheet . . . used to deposit checks." When Ms. Ivey returned to work, Whitworth testified that he brought all of these delinquencies to her attention. Ms. Ivey offered various excuses. Her primary excuse was overwork and inadequate staff. How this prevented her from preparing the monthly reports, depositing checks, answering inquiries from store managers, and the other shortcomings in her performance was not detailed by Ms. Ivey.

In line with its employment policy, Ms. Ivey's superiors reviewed with her at least two times before her demotion her job performance.[16] On each occasion, she was told by her superior that her performance was not adequate and did not qualify for an increase in pay. At this review her superiors indicated to Ms. Ivey the shortcomings in her performance. Ms. Ivey did not contest the shortcomings specified by her superiors in her performance. She sought again to excuse them because of inadequate staff and overwork.

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[16] The majority states that the defendant repeatedly complimented Ms. Ivey on her work. Such statement is incredible in the light of the record. On every occasion when the defendant reviewed the work performance of its employees as a basis for pay increases, Ms. Ivey was told by her superiors that she was not going to receive any increase in pay because her work was not adequate or satisfactory. And Ms. Ivey admitted this. There was no clearer way in which the defendant could have expressed its dissatisfaction with Ms. Ivey's performance than this. In the face of this undisputed evidence, I simply cannot understand the statement in the majority opinion.

The last of these reviews was in April before her demotion. One of the items of discussion in both of these reviews was the continuing one relating to her failure to prepare her monthly reports. At her final April review, Ms. Ivey said she would have the reports by July next.

During the period when Ms. Ivey was supervisor Whitworth said he had repeated complaints from other departments about the noise and loud talking in Ms. Ivey's department. He had called this to Ms. Ivey's attention. Ms. Ivey generally blamed the noise on a white employee, Cindy Newsome. Whitworth told her she was the boss and she should control her employees. Further, he pointed out to her that she made as much noise as others in the department and she should set an example. Although Ms. Ivey seemed to blame her difficulties on Cindy Newsome, she never recommended

either the discharge or disciplining of Newsome.[17]

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[17] In her own testimony, Ms. Ivey sought to justify such failure by saying that she knew it would be unavailing since Newsome was a sister-in-law of Whitworth, the boss, though later she admitted that Newsome was related only to an ex-secretary of the boss. Moreover, Newsome left the department sometime before there was a change in Ms. Ivey's status.

The district court attempted to give some racial coloring to this incident by comparing the conduct of Whitworth in refusing to intervene in this case with that of Straughn in refusing to intervene by overruling supervisor Hart in the Brown case, later discussed. The conduct of Whitworth and Straughn was not inconsistent. The position taken by Whitworth was the same as that taken by Straughn. In both cases Whitworth and Straughn refused to intervene to overrule a subordinate supervisor or to direct the supervisor on how to direct those in the subordinate's department; the position taken in both instances that the action to be taken was for the subordinate supervisor and Whitworth and Straughn, as the supervisors' superiors, would not intervene to supersede the subordinates' supervisors' authority.

In the meantime, the defendant had merged with another company engaged in a similar business but on a larger scale. The other company had a more sophisticated system for controlling "third party receivables" than had the initial employer and the merged company determined to shift over to the more sophisticated system operated by the other company. Whitworth, Ms. Ivey's superior, testified that, since Ms. Ivey had shown an inability to handle the simpler system used by the old company, it was obvious, Whitworth reasoned, she would not be able to handle the more sophisticated one.[18] He accordingly called Ms. Ivey in, explained

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[18] Whitworth's testimony on this point was:

> "As I said, the reason I decided to change was because the work simply was not getting done under Ms. Ivey. I knew that the system we were getting ready to go on was much more detailed than the system that she had been unable to handle before. So I saw no reason why I could

the situation to her, told her he was going to transfer Ms. Wilkes from the accounts receivable department, where she was the second in command, to this new department as the supervisor. He offered Ms. Ivey the opportunity to transfer without any diminution in salary to another department, if the change embarrassed her. She declined, saying "that she and Marilyn [Wilkes] work well together."

I submit that this evidence offered by the defendant, so much of it undisputed by Ms. Ivey, met the test established in Burdine for articulating a legitimate reason for its action, and thereby shifted the burden to the plaintiff to prove by the preponderance of the evidence that "the

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Footnote 18 continued

> expect her to handle the more complicated system, when she couldn't handle the simple system we were on."

proffered reason was not the true reason for the employment decision but pretextual" and that "she [had] been the victim of intentional discrimination."

Ms. Ivey assuredly did not thereafter satisfy her burden of persuasion that the articulated reason for Ivey's replacement was pretextual by any proof of a general practice of discrimination in promotion or demotions on the part of defendant, or by an evidence of discrimination in the treatment of black supervisors as contrasted with white supervisors, or by any record of harassment of the plaintiff Ivey. Thus, in its initial Memorandum of Decision,[19] the District Court stated:

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[19] This Memorandum of Decision, entered a month or so after trial, was a statement of the District Court's conclusion. Thus, it began the Memorandum with this explanation:

> "In accord with the foregoing, plaintiffs are directed to submit by June 30, 1978, proposed findings of fact, conclusions of law, and an appropriate order or orders."

> "The court does not find that Ivey's demotion represents any general pattern, practice or policy regarding demotions. There is no evidence that Ivey or any other class member who held a supervisor position was given more onerous duties or was held to a higher standard of performance than whites in a comparable supervisory positions. The Court would like to hear further from the parties on whether Almetta Ivey is, on these facts, entitled to any relief, and if so, what relief ought to be afforded." (Italics added)

What apparently the district court rested its finding on in this case was, first, that the defendant had not borne its burden of rebutting the claimant's prima facie case in that it had not established that Ms. Ivey's replacement was better qualified than Ms. Ivey. This proof of comparative qualification was essential, according to the district court, if the defendant were to sustain what the district court erroneously conceived to be the defendant's burden of persuasion. In its initial Memorandum of Decision, the district court made this perfectly clear. It said:

> "Although the system of accounting in the third party receivables department was changed in June, 1977, defendant did not demonstrate that Ivey was less capable of handling the new system than the new supervisor brought into the department. Her demotion was due, at least in part, to her race."

Later, in its subsequently entered findings of fact, the district court repeated this finding as the critical shortcoming in defendant's proof:

> "Eckerd Drugs did not demonstrate that Ms. Ivey was less capable of handling the new system than her white replacement, and failed to demonstrate that Ms. Ivey's replacement was as, or more qualified, than Ms. Ivey."

I submit that the majority cannot successfully argue that the ultimate finding of the district court on this claim was not tainted or influenced by the district court's legal mistakes on both burden of proof and on the evidence on which a finding of racial discrimination in employment may be made. The majority admits that the district court incorrectly applied to the defendant

a heavier burden of proof than Burdine allowed. Moreover, every time it found that Ms. Ivey's replacement was due "in part at least" to "race," it prefaced the finding by reciting that the defendant had failed to "establish," that is, to "prove," that the white replacement was as well as or better qualified than Ms. Ivey. That requirement of proof, thus noticed by the district court in this forceful fashion, was, as the majority again concedes, erroneous as a matter of law under Burdine. How, then, can it be fairly said that such erroneous finding of fact did not enter into and was not a factor-- in fact, the deciding factor-- in the district court's ultimate conclusion on the Ivey claim? Equally pertinent, how can it be fairly said that imposing on the defendant the burden of rebutting the claimant's prima facie case did not influence the decision in this case? Which party has the burden of proof is

often decisive in the resolution of a case. When that burden is illegally imposed on a party is not the decision tainted? I submit reversal is required in this case as much as, if not more so, than it was in Ste. Marie v. Eastern R. Ass'n, supra, in Daye v. Harris, 655 F.2d 258, 263 (D.C. Cir. 1981), and in Piedmont Minerals Corporation v. United States, supra.

While the failure of the defendant to prove that Ms. Wilkes was better qualified as a supervisor than Ms. Ivey apparently was a deciding factor in the district court's decision, two other circumstances were referred to in the district court's opinion. First, the district court states that Ms. Ivey trained Ms. Wilkes. We remark parenthetically that this statement, intended to point up the failure of the defendant to prove that Ms. Wilkes was as well as or better qualified than Ms. Ivey merely accentuated the effect of the district

court's error of law upon its ultimate decision. But the validity of this statement factually was disputed vigorously by the defendant, and finds no real support in the record on careful analysis. Ms. Ivey certainly could not have trained Ms. Wilkes in the preparation of her reports which were essential for the control function of the department under the abandoned system: Ms. Ivey had never in all her months as a supervisor been able to prepare one. Moreover, the defendant was installing a new system, and Ms. Ivey had no familiarity at all with it and was in no position to train anyone in its operation. Actually, Ms. Ivey's testimony was not that she trained Ms. Wilkes but simply that as one who had been with the department from the beginning she explained "to Marilyn what goes on in the department." The district court, also, finds fault with the defendant for not giving Ms. Ivey until July to prepare

and get in her first monthly report as a supervisor after approximately a year and a half in her job as a supervisor before demoting her as it did in June. However, the district court itself seems to have answered this claim. It found in the quotation from its Memorandum of Decision already quoted that "the system of accounting in the third party receivables department was changed in June, 1977," when Ms. Ivey was replaced as supervisor. Any report under the old system would have been useless as a result of this change. There was no point in waiting for a report that had lost all relevancy. The decisive fact-- and one not really disputed in the record-- was that, in instituting a new and more complex system of controls in the department, it was reasonable to consider the inability, after experience for almost a year and a half, of Ms. Ivey to master the older, less complicated system

and to conclude that her replacement was in order. The claimant Ivey offered no reason to find that such decision was unreasonable or pretextual or that it represented intentional racial discrimination. She had thus not met the burden of persuasion placed on her by Burdine.

Finally, it must be remembered that there is not the slightest evidence of any kind of racial prejudice on Whitworth's part in the entire period that Ivey was a supervisor under him. When the department was constituted, Whitworth could have appointed a white employee in the department as supervisor. He did not; he promoted Ms. Ivey. Never once did Ms. Ivey testify to any harassment on the part of Whitworth or any other superior because of her race. In fact, Whitworth, despite the fact that, as Ms. Ivey herself admitted, Ms. Ivey was not doing her job, struggled along with her, giving her repeated opportunities to improve.

This certainly does not indicate that Ms. Ivey was being subjected to racial discrimination. I repeat: Though she had been supervisor for almost a year and a half, Ms. Ivey had never been able to prepare a single monthly report of the operation of her department. The report was not difficult to prepare; it involved a matter of simple addition which any eighth grade student should have been able to do easily. Ms. Ivey had been repeatedly told of her shortcomings as a supervisor and she did not dispute them. When the more sophisticated system was installed, Whitworth concluded he had gone as far as he could with Ms. Ivey. But-- and this is something that demonstrates the absence of any intention to be unfair to Ms. Ivey-- Whitworth offered to transfer Ms. Ivey to any other department where she might think she could work more effectively and, in any event (whether she transferred or not) <u>she would continue to be paid her</u>

supervisor's salary. She chose to remain in the department at her supervisor's salary. There is thus a complete absence of any racial connection with this episode. It can only be assumed that the district court reaches its conclusion because of its erroneous view of the burden of proof between the parties and because it considered proof that the replacement was as qualified as, or better qualified than Ms. Ivey, was essential if a finding of discrimination were not to be made against the defendant.

The individual claim of Ms. Ivey should have been dismissed by the district court which committed manifest error in ruling otherwise on the grounds assigned. Only if we are to disregard Burdine and our own case of Ambush can the claim of Ms. Ivey be affirmed. Frankly, I cannot understand the action of the majority in affirming the judgment in favor of Ms. Ivey, especially

since Burdine so plainly compels reversal of the judgment in favor of Ms. Ivey.

III

The plaintiff Brown's claim is no less lacking in merit than that of Ms. Ivey. She was employed by the defendant as a keypunch operator in the main office of the defendant and quit her job on June 3, 1975. It was the finding of the district court that "she quit her job under pressure from her supervisors" and it accordingly concluded that she had been constructively discharged. The doctrine of constructive discharge, relied on by the district court for its conclusion, is well recognized. It "had its genesis in the labor relations area (citing authority) but has been extended and held applicable to civil rights cases," English v. Powell, 592 F.2d 727, 731, n.4 (4th Cir. 1979). When properly proved, it is no different in effect than an actual discharge. In

order to establish a constructive discharge violative of Title VII the plaintiff must prove by the preponderance of the evidence that he was forced to quit his employment by reason of intolerable working conditions imposed on him by his employer, who was motivated in such imposition by racial or sex bias. J. P. Stevens & Co. v. N.L.R.B., 461 F.2d 490, 494-95 (4th Cir. 1972); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir. 1981); Cartwright Hdw. Co. v. N.L.R.B., 600 F.2d 268, 270 (10th Cir. 1979); Muller v. United States Steel Corporation, 509 F.2d 923, 929 (10th Cir. 1975).[20] A finding of "intolerable

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[20] As phrased in Stevens, the doctrine of constructive discharge, as applied in the labor relations area, was defined thus (461 F.2d at 494):

> "Where an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit

working conditions" under the doctrine is not satisfied by proof that the employer was "very demanding of the employee" or that he "often dealt with [them] in a harsh manner;" such a finding "arises only when a reasonable person would find [the conditions] intolerable." Johnson v. Bunny Bread Co., supra, 646 F.2d at 1256. Moreover, the employer's imposition of "intolerable working conditions" must have been "taken with the intention of forcing the employee to quit" and not as a general employment policy. Id. at 1256. Nor will mere "isolated, casual, accidental or sporadic" harassment suffice to establish a constructive discharge; the doctrine requires a "concerted

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Footnote 20 continued

> his job because of union activities or union membership, the employer has constructively discharged the employee in violation of Section 8(a)(3) of the [National Labor Relations] Act."

pattern of harassment," "so excessive and opprobrious as to constitute an unlawful employment practice under Title VII." Carridi v. Kansas City Chiefs, 568 F.2d 87, 88 (8th Cir. 1977); EEOC v. Murphy Motor Freight Lines, 488 F.Supp. 381, 384-85 (D.Minn. 1980). But-- and this is the critical issue in the civil rights context-- in order to render a constructive discharge remediable under Title VII, the intolerable conditions must also have been motivated by racial or sex bias. Johnson v. Bunny Bread Co., supra, 646 F.2d at 1256-57.

The doctrine of constructive discharge thus depends for its application in the civil rights or Title VII area on three specific findings: 1. That the employer imposed on the employee intolerable working conditions; 2. That the employer's action was taken with the intention of forcing the employee to quit; and 3. That his actions were motivated by a racial or sex bias.

Cartwright Hdw. Co. v. N.L.R.B., supra, 600 F.2d at 270-71.

In its Memorandum of Decision, the district court predicated its factual finding of constructive discharge strictly on events occurring at "a conference on June 3, 1975, involving plaintiff, her immediate supervisor Penny Hart, the supervisor of all data processing operations John Strong (Straughn), and a personnel representative Glenda Hanner." The conference was called, according to this finding, "to discuss plaintiff's attendance record, her work performance and her attitude toward the company." "[T]empers were high on both sides" at the conference and, according to the district court, "[t]he treatment plaintiff received in the meeting would not have occurred had she been white; her conflict with her superiors was due at least in part to her race." There was no elaboration on these findings

in the Memorandum, prepared by the district court. However, in the Findings later submitted by the plaintiffs and, as modified in a few particulars, adopted by the district court, the circumstances on which the district court made its finding of constructive discharge included some matters occurring before the conference of June 3rd.

The first of these earlier events cited in the later Findings was the refusal of the plaintiff's supervisor to change Ms. Brown's work station for "some three weeks after [her] initial request [for such change], even though she (Ms. Brown) told Ms. Hart she was having "difficulties with white employees," and "other operable work stations were available." Ms. Brown protested this decision over the head of her supervisor to the supervisor of all data processing operations, though, her supervisor told her later she was a "fool" to have done this. The next incident in

point of time was that the plaintiff "thought" herself referred to as a "nigger" on the day before the meeting of June 3 and that at the meeting Straughn at one time referred to the plaintiff as "girl". Finally, at the meeting on June 5, Ms. Brown claimed Ms. Hanner was misinterpreting her remarks during the conference. It is said that Straughn and Hart at that conference "insisted on [a promise of] absolute attendance" and the plaintiff promised "she would do her best to be at work, and not be absent every time her child was sick." The district court found that the plaintiff's "response was reasonable." Such were the findings on which the district court's conclusion of a constructive discharge rested.

I seriously question that the plaintiff made out a prima facie showing of a constructive discharge motivated by a desire on the part of the

defendant to be rid of the plaintiff as an employee because of racial bias. Aside from that, however, the defendant clearly gave a lawful reason for every action taken by it, about which the plaintiff complains and gave the clearest evidence of an absence of racial harassment or discriminatory intent. Without so much as discussing any of these reasons as articulated by the defendant in its evidence, [and without later considering whether they were "pretextual,"] the district court dismissed them with the bare statement that the "defendant failed to rebut." It is obvious once again that the district court erroneously assumed that when the plaintiff made out a prima facie case the burden shifted to the defendant to disprove that prima facie case, and that if it failed then it had not rebutted the prima facie case. As we have already observed in connection with the Ivey claim, this assumption is contrary

to the rule declared in Burdine, and, just as in Ste. Marie v. Eastern R. Ass'n., supra, 650 F.2d 398, this decision must be reversed for that reason.

Any review of the record in order to determine whether under Burdine the defendant articulated a lawful reason for its action, must begin with the undisputed fact that the plaintiff never in the first few months of her employment under her supervisor Hart and the over-all supervision of Straughn experienced the slightest harassment or evidence of either personal or racial bias, whether by her supervisors or by her fellow employees. Indeed, both Hart and Straughn, if anything, seemed to favor the plaintiff. As evidence of this is their treatment of Brown's request for maternity leave in early January, 1975. When told by Brown that she was pregnant within a month or so of her employment (of which they knew nothing

when plaintiff was employed) and a request was made by plaintiff for maternity leave--a request which it was the policy of the defendant to refuse in the case of employees with less than a year of employment[21] --Ms. Hart on her own went to Straughn to request an exception in the plaintiff's case. And Straughn granted it. This certainly was a strong manifestation of the absence of any personal or racial bias against the plaintiff on the part of the plaintiff's supervisors. Further, there is no evidence of any racial bias in the department where the plaintiff worked. At the time of trial, Ms. Hart testified that half of the operators were black and one of her two assistants was black. This was undisputed. If the defendant

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[21] The plaintiff testified that she did not know this was the policy of the defendant. However, the testimony of the defendant that such was the policy was undisputed. Moreover, it would not have been necessary for Ms. Hart to seek permission from higher authority in order to grant this leave to the plaintiff if there had not been such a policy.

was employing blacks at this rate in the department, it is difficult to infer that the defendant, and particularly Ms. Hart and Straughn, had any aversion to employing blacks or had any reason to harass or fire the plaintiff or any other black employee simply because the employee was black.

Turning to the first incident cited by the district court in its final Findings of Fact,[22] -- i.e., the failure to reassign the plaintiff to another work station--the defendant gave a very reasonable explanation of the action taken. The

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[22] The plaintiff's testimony of her complaint as stated to Ms. Hart on April 10th was:

> "A. I just told her [Ms. Hart] that there was constantly bumping me and I had made Mary [her neighbor at work] aware of it and she was still doing it and I asked her if I could take one of the empty desks.

plaintiff made her first request for a reassignment on April 10. Ms. Hart told her that she expected shortly to make a complete reassignment of all the employees and would at that time take care of the plaintiff's complaint. This was the common way for Ms. Hart to deal with such situations.[23] The plaintiff said that was "acceptable"

Footnote 22 continued

> "Q, Okay, and she said she would change your seat around when she changed the whole office, but that she couldn't do that in the middle of the week, right?
>
> "A. She said that she would change my desk around when she changed the whole office, period.
>
> "Q, You said, 'Well, okay, that's acceptable.' right?
>
> "A. Yes, I did."

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[23] Ms. Hart testified "[i]t was my custom to do this [move everyone around] to break up

to her. On the 16th, however, Ms. Brown complained again to Ms. Hart and Ms. Hart, according to Ms. Brown's testimony, replied that she would "not change [the plaintiff's] desk until she changed everybody's." Ms. Brown responded that "if she would not change my desk this time, that I would go to somebody that would."

Ms. Brown went to the office of Mel Harvey, who told her he had no authority to direct the change and referred her to Straughn. Straughn, however, refused to overrule Ms. Hart, saying that "if he had to come in and change [Ms. Brown's] desk he would have to come in and take over her office and he did not intend to do that." Ms.

Footnote 23 continued

people that did not get along or people that get along too well that it hampered their work habits. I moved everyone at the same time."

It was a practice uniformly followed by Ms. Hart and applied equally to both black and white employees.

Brown's answer to this was, as she herself testified, "Okay, I'll go back there, but don't expect me to put out one hundred per cent." In her statement as given to the EEOC the next day, her response was given as: "Well, I said, I'll go back in there and I'll sit at the same desk, but don't expect me to put out a hundred percent." Ms. Brown then testified that Straughn told her, "You'll go back in there and put out a hundred percent or else", to which Ms. Brown replied, "t]hen I said, or else I'm not going to quit my job, you'll have to fire me." Straughn inquired whether Ms. Brown was giving him an ultimatum. Ms. Brown's reply was: "I said, no, you said that."

The plaintiff thereupon returned to her job but the next day, April 17 she left work at 1:50 p.m., claiming sickness. However, she went that

afternoon to the local EEOC and complained.[24] She testified that from this time on, she kept a detailed account of any complaints she might have in connection with her employment while she was working. She returned to work on Friday, April 18. The plaintiff was absent from work all of the following week, returning to work on April 28. On April 29, Ms. Hart made the general reassignment of stations among the employees, including "the plaintiff," which Ms. Hart had previously told the plaintiff she was preparing to do.

The defendant, through its witnesses, filled in a considerable amount of material on this incident. There was no dispute that a Ms. Baker and the defendant had some conflicts and that Ms. Baker was white and the plaintiff black.

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[24] Neither the plaintiff nor the EEOC notified the defendant of this complaint until just before this suit was filed.

But there is nothing in the record to suggest that those differences arose out of any racial conflicts or involved any racial slurs. There were many blacks in the department. So far as the record shows, Ms. Baker had had no trouble of any kind with any other black employee in the department. The difficulty between Brown and Baker appears to have been merely a personality conflict between the two. Moreover, Ms. Hart explained in her testimony her reason for not immediately granting the plaintiff's request. First, the plaintiff wished to be assigned to a particular station occupied by another employee. Secondly, there were, as the plaintiff testified, a few stations unoccupied. The machines at some of these stations were inoperative; the others were not serviceable because of their remote location (the operator was required to look always at the wall.) In Ms. Hart's opinion, the whole problem

could be better remedied by the general reassignment being developed by her at the time. This was her general rule when difficulties arose between employees.[25] The plaintiff indicated this arrangement was acceptable to her. When the plaintiff renewed her request on the 16th, Ms. Hart gave her the same answer. The plaintiff responded by going over Ms. Hart's head and, then, when her request was denied, by threatening her superiors with a work slow-down. The conduct of the plaintiff was, by any standard, insubordinate, warranting severe discipline. The defendant, by its conduct, clearly established that it was not seeking to force the plaintiff to quit (if it had such an intention, it had ample justification for discharge in the plaintiff's conduct) and there is no

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[25] See note 23.

intimation of any racial motive in defendant's action. Moreover, the defendant gave a perfectly reasonable explanation for its action, which accorded with its established practices.

The second incident listed by the district court was the alleged use of the term "nigger" in a conversation of Straughn on June 2 before the final incident on June 3. Straughn denies any such use of the term. The plaintiff claims to have overheard Straughn use this term in a conversation with certain persons. She recalls no other language used in the conversation nor could she give any account of the conversation; she claimed only to have heard the one word. She had no recollection of the context in which it was used. But she merely "thought" it must have referred to her since she was the only black nearby at the

time.[26] Though the plaintiff had at the time been working at the defendant's office for some six months, she testified to no other occasions when she asserted she had heard anyone use the word "nigger" and certainly she testified to no racial slurs that had been directed to her by any fellow employees or by her superiors. In Johnson v. Bunny Bread Co., supra, the plaintiff, asserted a constructive discharge based on harassment consisting largely of racial slurs. The Court, in dismissing the claim said (646 F.2d at 1257):

> "We find no steady barrage of opprobrious racial comment. The use, if any, of racial terms was infrequent, was limited to casual

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[26] The majority incorrectly states that Ms. Brown was referred to as a "nigger" by Straughn. That does not accord with the record, and the district court corrected the proposed Findings of Fact as submitted by plaintiffs' counsel on this point. Ms. Brown testified that she did not know whether the term referred to her but she "thought" it did, even though it was in no way addressed to her.

> conversation among employees, and with possible rare exceptions was not directed toward appellants. '[M]ore than a few isolated incidents of harassment must have occurred. Racial comments that are merely part of casual conversation, are accidental, or are sporadic do not trigger Title VII's sanctions.' . . . Such racial slurs as were present at Bunny Bread were largely the result of individual attitudes and relationships which, while certainly not to be condoned, simply do not amount to violations of Title VII."

Certainly the evidence in this case is a "far cry" from that in Bunny Bread. At best, there was a single "accidental" or "sporadic" use of the term "nigger" and the context in which it was used is not indicated. Apparently, if used, it was used as "merely part of casual conversation." There is no evidence that the term, if used, had any reference to the plaintiff. Even the plaintiff merely says she "thought" it referred to her. This single episode, if it did occur, representing the utterance of a single racially objectionable comment heard by the plaintiff over the entire

period of her employment by the defendant cannot amount to that degree of harassment which will support a finding of constructive discharge because of racial bias.

The final circumstance relied on for a finding of constructive discharge occurred at the conference with the plaintiff on June 3. The defendant amply proved a lawful reason and justification for this session with the plaintiff. Since the first of the year, the plaintiff had been absent from work on at least four occasions. From January 7 until April 7, she, in effect, was on maternity leave. When, on April 16 she was denied a reassignment of station, she took off from April 17 until April 28. Two and a half weeks later she took off on May 15, 16 and 19. She claimed that Ms. Hart suggested she take off but Ms. Hart denied this; and the record suggests no reason why Ms. Hart should have made any such

suggestion. Again, on May 28, 29 and 30, the plaintiff was absent from work. When she returned to work on June 2, Ms. Hart inquired of the plaintiff why she had been absent and was told that her child had been sick on some bad milk she had purchased at an Eckerd's store. The plaintiff demanded that she be paid for the days she had been off. Moreover, there is no dispute that the plaintiff had, since April 16, when she threatened that she wasn't going to put out "one hundred per cent," committed a large number of errors in her work. The plaintiff later attempted to explain these errors by claiming that the computer programs had been changed while she was absent and Ms. Hart had refused to help her adjust to the changes. Ms. Hart denied any such request for help. Whether Ms. Hart was correct in her testimony or not, the fact is that the plaintiff was guilty of an excessive number of errors. Finally, the defendant

was concerned about the plaintiff's attitude to her work. Though not known to the defendant, the plaintiff had already filed a complaint with the EEOC. This was an obvious expression of her dissatisfaction with her job. She had already demonstrated insubordination and defiance of authority. There was thus abundant justification for a discussion with the plaintiff of her absenteeism, poor work, and general work attitude. This evidence met the test for the articulation of a lawful reason for the conference.

At the conference, Straughn and Ms. Hart sought some commitment from the plaintiff of improved work attendance. The plaintiff's excuse for absenteeism appears to have been generally the need to stay home with her child. Ms. Hart and Straughn inquired into the arrangements she had made for taking care of her child while she worked. Discussion turned to minor ailments of the child.

The two sides differ somewhat on what Ms. Hart and Straughn wanted in the way of a commitment from the plaintiff about future absenteeism. There can be no question that Ms. Hart and Straughn were seeking a promise from the plaintiff of better attendance. The plaintiff claimed Ms. Hart and Straughn wanted an absolute commitment of no absence. This does not seem borne out by the record, since, if this were the case, there would have been no occasion for the difference between her child's minor sicknesses and serious sicknesses which developed in the discussion. The plaintiff's absenteeism was excessive by any standard and the defendant had a perfect right to request a promise of improvement by the plaintiff. The plaintiff, however, does not seem to have taken kindly to the criticism directed at her. Tempers arose on both sides. Straughn at this point brought Ms. Hanner into the conference, thinking that a new

person who had had no previous acquiaintance with the problem might mediate the difference. Ms. Hanner's presence appears to have had the reverse effect. According to the defendant's witnesses, when Ms. Hanner indicated some agreement with the position taken by Ms. Hart and Straughn, the plaintiff dismissed Ms. Hanner, saying that it was obvious she was "on the side of the whites." The plaintiff's version was that Ms. Hanner offended her by Ms. Hanner's "terminology" in restating the plaintiff's position. Apparently what she was suggesting was that Ms. Hanner was subtly disparaging the plaintiff's expressions, as typical racial language, though the defendant, despite considerable effort to do so, was unable to extract from the plaintiff any statement of Ms. Hanner that could reasonably support such an inference by the plaintiff. Whichever version is accepted, it is clear that this was the first time

in all the encounters between the plaintiff and her superiors that anything racial had been injected into the relationship and it was injected by the plaintiff. Ms. Hanner's reaction was to state that she had not understood that this conference represented "a white-black situation." With this, the plaintiff demanded either that a black or her lawyer be brought into the discussion, Ms. Hanner explained there was no black supervisor available and that she did not think it fair to bring a fellow employee into the discussion. The plaintiff then turned her back on the others and refused to talk. Ms. Hanner said that if the plaintiff was unwilling to talk to her, Ms. Hart and Straughn, perhaps she would be happier working elsewhere. With that, the plaintiff uttered, according to the defendant's witnesses, an obsenity and walked out.

Such was the testimony on which the district court made its finding or a constructive discharge. As I have already said, the record was not, in my opinion, sufficient to make out a prima facie case of constructive discharge remediable under Title VII, but, whether it was or not, the defendant had made a sufficient rebuttal under the Burdine rule to shift the burden of persuasion to the plaintiff to establish by the preponderance of the evidence that the plaintiff had been forced by "intolerable working conditions" imposed by the defendant on the plaintiff with the motive and purpose of forcing the plaintiff to quit because of the defendant's racial bias. The plaintiff made no real effort to show upon the shift of the burden of persuasion to her that the defendant's explanation of lawful motive was pretextual and that the constructive discharge was the result of intentional discrimination. There simply was no

attempt either by the plaintiff or by the district court to follow the rule in Burdine, even though, as Judge Friendly observes in Ste. Marie, this principle had "been clear ever since McDonnell Douglas,"[27] nor, for that matter, was there any attempt to comply with it in the majority opinion. In fact, the majority opinion simply sweeps the doctrine "under the rug" and, without any review of the record or of the defendant's evidence (an error which was equally true of the district court), affirmed the plaintiff's claim on the district court's finding under the clearly erroneous rule. I submit Burdine requires more of us as well as of the district court.

The record in this case provides not the slightest basis for a finding of a constructive

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[26] 650 F.2d at 399.

discharge violation of Title VII. The repeated evidence of consideration for the plaintiff by her superiors demonstrates conclusively that the defendant was not seeking to force the plaintiff to quit or to impose on her intolerable working conditions. The plaintiff's superiors bent the rule on maternity leave to give special treatment favoring the plaintiff. Even as the plaintiff details the facts, the only time the plaintiff experienced any difficulties in her job was for a period between April 10 and April 16, when the defendant refused to change her work station. There is, however, not any evidence that, in refusing to make this change for the plaintiff, the defendant was acting any differently from its usual treatment of such requests. Further, whatever difficulties the plaintiff may have had with Ms. Baker (who, incidentally, was smaller than the plaintiff) were free of any racial aspects.

I assume this because the plaintiff testified to none. Moreover, if the defendant had any covert desire to rid itself of the plaintiff as an employee, the plaintiff provided the defendant with the perfect justification for firing her. One may find it difficult to understand why Straughn did not fire the plaintiff on April 16 when she threatened him that she was not going to give a "hundred percent" to her job. Later, the plaintiff's absenteeism and work errors were excessive and the defendant cannot be faulted for requesting of the plaintiff more attention to her job. When any racial overtones were introduced into the conference, they were introduced by the plaintiff. I submit, with all deference for the views of my fellow panel members, that there is insufficient evidence to make out a prima facie case of constructive discharge and, were there such evidence, the defendant articulated lawful

(OPINION CONTINUED IN VOLUME 2)

Appendix

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81-1761

NO.

IN THE

Supreme Court, U.S.
FILED
MAR 16 1982
ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

OCTOBER TERM, 1981

ECKERD DRUGS, INC., a corporation now merged with JACK ECKERD CORPORATION, a corporation and ECKERD'S PROVIDENCE, INC. (Store #4), a wholly-owned subsidiary of ECKERD DRUGS, INC., now merged with JACK ECKERD CORPORATION,

Petitioners,

vs.

SHIRLEY BROWN and DOROTHY BLACK, Plaintiffs, and ALMETTA IVEY, Intervenor, individually and on behalf of all others similarly situated

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

VOLUME II

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reasons for its actions and, contrary to the district court's conclusion, it rebutted the plaintiff's prima facie case and the burden of establishing her claim shifted back to the plaintiff under Burdine. The plaintiff made no effort to take up her burden of showing that the reasons given by the defendant were pretextual and a cloak for intentional discrimination. Accordingly, this individual claim of constructive discharge, just as Ms. Ivey's claim, should be dismissed; and, since the findings on which the decision rested were tainted by legal error on the burden of proof, that decision cannot be affirmed under the clearly erroneous rule. See Owen and Piedmont Minerals, supra.

IV

The affirmance of the district court's decision on the class action aspect of the proceeding is, in my opinion, as manifestly erroneous as

the affirmance of the decision on the individual claims of Ivey and Brown. In affirming the class action part of the decision, the majority proceeds on the assumption that Brown and Black (and only Brown and Black) were appropriate representatives of the entire class certified by the district court; it expressly refused to consider the claimant Ivey as a proper class representative as a result of her post-trial intervention. In short, then, the propriety of the class certification and the class relief depends on the qualification of Brown and Black as class representatives for the class certified by the district court.

Both Brown and Black had been hired by the defendant and had worked for some time for the defendant; both had been discharged. Their individual claims were accordingly that their discharges had been tainted by racial bias and

that only. Over the defendant's objections, the district court (by an order dated March 3, 1977), tentatively certified in reliance on Barnett v. W. T. Grant Company, 518 F.2d 543 (4th Cir. 1975), Black and Brown as proper class representatives to prosecute the action on behalf of a class consisting of:

> "The class shall consist of plaintiff and all blacks in the Mecklenburg County facilities of defendant and its wholly owned subsidiary, Eckerd Procidence, Inc., who have since January 18, 1975, or may have been affected by discrimination by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence Inc. on the basis of race in connection with hiring, promotion, termination, job assignment, and geographical assignment; the class includes all blacks so affected who (a) are currently employed by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc.; (b) have been employed by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc.; since January 18, 1975, and have been terminated or otherwise left defendant Eckerd Drugs employment; or (c) have applied for employment with defendant Eckerd Drugs,

> Inc. or its wholly owned subsidiary Eckerd Providence, Inc. at any time since January 18, 1975 and were denied employment."

On May 24, 1977, it finally certified the class as described in its tentative order of March 3. Later, on July 26, 1979, after this Court decided Hill v. Western Elec. Co., Inc., 596 F.2d 99 (4th Cir. 1979), cert. denied, 444 U.S. 929, the district court amended its certification by eliminating from the class certified all "[a]pplicants for initial employment" as described in paragraphs 16 and 18 of its Memorandum of Decision. Further, in its Memorandum of Decision itself, the District Court had found that the plaintiffs had "not established any general discriminatory pattern or policy as to discharges, layoffs, demotions, pay or working conditions." Later, in its Findings of Fact, entered in support of its Memorandum of Decision, the District Court confirmed its finding that no pattern of discrimination had been proved

"as to discharges, layoffs, demotions, pay or working conditions," and dismissed any claims of persons claiming discriminatory failure to hire because such persons failed to qualify as class members. Thus, the only class members found to be entitled to relief were "[c]lass members who have claims for promotion and transfer into management or supervisory jobs at any of the facilities" involved. In essence, then, the only class claims in this case relate to promotions, nothing more.

Hill made it the rule of this Circuit that a named representative "'must possess the same interest[s] and suffer the same injury' as the class members they seek to represent.'"[28] Thus, one who is employed may not represent as a class

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[28] 596 F.2d at 101.

representative those who were not hired. The district court recognized this and held that the named representatives in this case, both of whom had been employed, could not represent as a class representative persons who claimed discrimination in hiring. The majority affirms this ruling and I assume agrees with the district court's ruling. But the district court held and the majority on this appeal agrees, that employees who never requested or sought promotion or who made any claim to a promotion but whose sole claim is that they were discriminatorily discharged can represent the class of employees who were denied promotion. This, I submit, is clearly contrary to Hill. I, accordingly submit that the plaintiffs in this case were no more qualified under Hill to represent the class of persons denied promotion than they were to represent the class of persons not hired.

The majority, however, declares that Hill "did not preclude an employee who suffers some particularized employment discrimination grievance from representing other employees who present factually differing claims that, nevertheless, proceed on the same legal theory of race discrimination" and its proceeds to resurrect Barnett v. W. T. Grant Co., supra, 518 F.2d 514 as authority for this. The language used by the majority, it is true, is an accurate statement of the ruling in Barnett but it most emphatically is not a formulation of the ruling in Hill. As a matter of fact, Hill very plainly overruled Barnett on the very ruling stated by the majority. In Hill, the plaintiffs-employees sought to proceed on the same legal theory of race discrimination as did the plaintiffs here (i.e., "that the company had engaged in a pattern of discrimination against blacks and females in hiring, in job assignments,

and in promotions to salaried and supervisory positions in its facilities in Arlington, Virginia)"[29] and to represent as a class representative all blacks and females discriminated against as a result of such broad claim of "race discrimination." The actual discrimination suffered by the plaintiffs, however, related to promotions. The Court in Hill said unequivocally that East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977) had limited the rule stated in Barnett, declaring that:

> "What is left of Barnett, however, is not broad enough to permit a named representative to represent a class of people who suffered different injury or those having similar claims but who are employed in other facilities."[30]

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[29] 596 F.2d at 100.

[30] 596 F.2d at 102.

Specifically, thus, we held in Hill that the plaintiffs in that case could represent as a class representative only that class of employees who had "suffered injury in precisely the same way in the denial of promotion," but they could not represent as class representative employees suffering discrimination of another type, such as hiring.

In fact, the construction given the opinion of the Supreme Court in Rodriguez, by Hill had already been suggested by this Court by way of dictum in Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-13 (4th Cir. 1978), particularly n. 53, and Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 906, n. 3 (4th Cir. 1978). And in United Black Firefighters of Norfolk v. Hirst, 604 F.2d 844 (4th Cir. 1979), we subsequently reached the same result and applied the same rule as in Hill. In that case, the plaintiff asserted an "across-the-board" discrimination claim

involving "recruiting, hiring, job classification, assignment, promotion, transfer, layoff, recall, discipline, discharge, benefits, training programs, compensation, testing, and condition of employment." However, the only specific complaint of the representative plaintiffs was one "of discrimination in promotion."[31] The Court refused to certify and on appeal we held, quoting from Rodriquez, that "[s]o far as the applications are concerned, the class action was properly rejected. Three named employees-plaintiffs have stated claims of discrimination in promotion. On remand the court should determine whether the employees-plaintiffs may represent as a class those who are similarly situated."[32] Thus, though

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[31] 604 F.2d at 846.

[32] 604 F.2d at 848.

the complaint in that case alleged an "across-the-board" discrimination claim, the court held that, since the only named plaintiffs with a discrimination claim were employees complaining of discrimination in promotion, the only class that could be certified was one having a claim of denial in promotion. Accordingly, before Hill, we had declared the same rule as was enunciated in Hill,[33] albeit by way of dicta in Shelton and Belcher, and after Hill, we had declared and followed in Hirst the rule as enunciated in Hill.

I would not be misunderstood. I do not suggest that the application of Rodriguez as stated in Hill is the only one that has been adopted by the Courts of Appeals. I recognize that there are two lines of authority on the issues. These two lines of authority with their

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[33] See, also, Doctor v. Seaboard Coast Line R. Co., 540 F.2d 699 (4th Cir. 1976).

different approaches to Rodriguez were marked out with precision in The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez, 13 Harv. C.R.-C.L.L.Rev. 175 at 177 (1978). The author identified the first as the "across-the-board" rule, under which "plaintiffs who alleged 'across-the-board'" "racial discrimination [are] permitted to represent all persons, however situated, who were affected by an employer's discriminatory policies." Under the other approach, known as the "same impact" doctrine, "only those suffering the 'same impact' as the plaintiff--for instance, a discriminatory refusal to hire-- could properly be considered mbmers of the plaintiff's class." Id. at 177. Courts are in dispute with respect to which approach expresses the majority construction of

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Rodriguez. That argument, if appears to me, is unimportant for us. Hill and Hirst have committed us to the "same impact" approach. And this is the way in which the other Circuits have construed the rule in this Circuit. Thus,

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34 In Vuyanich v. Republic Nat. Bank, Dallas, 505 F. Supp. 224, 235-6, (N.D. Tex. 1980), the Court discusses the two lines of authority, states that Falcon represents the rule in the Fifth Circuit, but adds: "The Fourth Circuit has reached a contrary result, Hill v. Western Electric Co., 596 F.2d 99 (4th Cir.) cert. denied, 444 U.S. 929, 100 S. Ct. 271, 62 L. Ed. 2d 186 (1979) . . . ." It then lists in footnote 10 a number of district court decisions reaching contrary conclusions on this point.

However, in Fields v. Village of Skokie, 502 F.Supp. 456, 460-61 (N.D. Ill. 1980), the court said:

> "Whether on Article III grounds or applying East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed. 2d 453 (1977), most Courts of Appeal that have considered the issue have held that a plaintiff employee who challenges an employer's discriminatory

in Falcon v. General Tel. Co. of Southwest, 626 F.2d 369, 375 (5th Cir. 1980), Hill is cited as stating the rule in this Circuit. The same is true in Vuyanich v. Republic Nat. Bank, Dallas, supra, 505 F.Supp. at 235-36 and in 82 F.R.D. at 433, n. 8. In fact, no court has suggested that the rule in this Circuit is different than as expressed in Hill.

Footnote 34 continued

> promotion practices may not represent a class complaining of discriminatory hiring practices because such claims are insufficiently similar. Hill v. Western Electric Co., Inc., 596 F.2d 99, 101-2 (4th Cir. 1979) cert. denied, 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed. 2d 186 (1980); Chaves v. Tempe Union High School Dist. 213, 565 F.2d 1087, 1094, n. 10 (9th Cir. 1977); accord, Scott v. University of Delaware, 601 F.2d 76, 87 n. 23 (3d Cir. 1979), cert. denied, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed 2d 189 (1980); cf. Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1308 (8th Cir. 1978) and Walker v. World Tire Corp. Inc., 563 F.2d 918, 922

I feel compelled, however, to say that I perceive in the majority opinion and in other opinions in the wings a disposition to overturn or at least erode the ruling in Hill by drowning it in interpretations contradictory of its clearly expressed holding. One evidence of this is the resurrection of that part of Barnett, which was specifically found in Hill to be contrary to Rodriquez. It is obvious, I submit, that Hill and Barnett both cannot stand and, if precedent is to have any meaning in our collegiate court, one or the other of these cases must be followed. Since Hill is our latest expression and declared Barnett

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Footnote 34 continued

(8th Cir. 1977). This Court does not agree with the minority view of the Fifth Circuit, Falcon v. General Telephone Co. of the Southwest, 626 F.2d 369 (5th Cir. 1980)."

no longer the law of this Circuit, I would assume we should follow Hill, until it has been overturned in the proper way.

Along this same line, I think it unfortunate that, in attempting to resolve whether an employee with a special grievance can qualify as a class representative of an across-the-board class, we look to pre-Rodriguez Circuit or District Court decisions. There can be no question that Rodriguez represented a watershed decision on this point. The article in the Harvard Civil Rights-Civil Liberties Law Review, cited by the majority, recognizes this.[35] Moreover, as we have seen, there are decisions subsequent to

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[35] The majority cites this student Comment in support of its view of Rodriguez in contradiction of that stated by us in Hill. What the writer in this Comment is really arguing is, not so much that the construction of Rodriguez in Hill was wrong but that the Supreme Court itself was wrong in Rodriguez. This is plain in the

Rodriguez which take the same view as that decision as we did in Hill and others such as Falcon, cited by the majority, which take a contrary view. I, however, find it somewhat odd that the majority cites and follows Falcon, when that decision points out that the rule in this Circuit as stated in Hill is contrary to that taken in Falcon. It is normal practice to

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Footnote 35 continued

first sentence in the Comment's concluding statement: "It is difficult to justify the result reached in Rodriguez." Id. at 199. The Comment titled Class Standing and the Class Representative, 94 Harv. L.Rev. 1637, 1642 (1981), is likewise an argument against the decision in Rodriguez.

I recognize the right of writers in Law Reviews to criticize and differ from the decisions of the Supreme Court but I submit that is a privilege not allowed Courts of Appeals or District Courts in the federal judicial system; it is our duty to follow the decisions of the Supreme Court until those decisions are reversed by the Supreme Court, Hicks v. Miranda, 422 U.S. 332, 344 (1975), and that is precisely what we sought to do in Hill.

look to decisions of other circuits for guidance on subjects on which our circuit has not expressed itself and, as I have said, I think it unusual that, when we have a number of decisions-- not simply Hill, but Hirst, as well, and in addition several dicta in other decisions-- we should look to contrary decisions of another circuit for guidance.

There is another suggestion in the majority opinion I find disturbing. The right of the two named plaintiffs to represent a class complaining of promotion discrimination, even though the named plaintiffs' own grievance is discriminatory discharge, is said to exist because, if the named plaintiffs are reinstated, they could at some future time possibly suffer discrimination in promotion. Such a suggestion is no more than saying that any employee, even though he has no individual grievance, may maintain a class action

charging "across-the-board" discrimination. I find such a suggestion a plain violation of the whole structure of Title VII. That Title not merely contemplates, it expressly requires, that a plaintiff under that Title, have an individual complaint and assert an individual grievance. And the defendant is entitled to notice of that individual grievance and to an opportunity to conciliate. These are not empty gestures as the Second Circuit made plain in the recent case of E.E.O.C. v. Sears, Roebuck & Co., 650 F.2d 14, 18-19 (2d Cir. 1981). These requirements of the statute just won't jibe with this suggestion in the majority opinion. Further, I have difficulty in finding how this suggestion can be reconciled with the Article III requirement of an actual, live controversy between the plaintiff and the

defendant.[36]

Equally open to objection is the suggestion that it is of no moment whether certification was authorized or not, if the discrimination claim has been tried and discrimination found. It would be a waste of judicial time, it is argued, to reverse under these circuistances, thereby necessitating a new case and a new trial with a new plaintiff in order to redress what Congress has found to be a public evil. We all will agree that discrimination is a public evil, but this does not mean that sound rules of procedure as mandated by Rule 23 are to be abandoned in individual (as distinguished from EEOC) discrimination cases. What this suggestion means, I submit, is that district courts should give only perfunctory consideration to certification

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[36] See Bailey v. Patterson, 369 U.S. 31, 32-33 (1962), as discussed in 84 Harv.L.Rev. at 1639, et seq., supra.

requirements in these discrimination cases, should tentatively certify them pro forma, should try the case and, if discrimination is proved, any error in the certification is thereby cured. This is a procedure not approved in Hill and Hirst. In both Hill and Hirst there had been a trial but that fact didn't prevent the court from reversing the judgments in both cases because of error in the certification. At least one commentator, however, has found that in Stastny v. Southern Bell Tel. & Tel Co., 628 F.2d 267, 277 (4th Cir. 1980), we held "that Rodriguez does not apply to pretrial certification orders." Karro, The Importance of Being Earnest: Pleading and Maintaining a Title VII Class Action for the Purpose of Resolving the Claims of Class Members, 49 Ford.L.Rev. 904, 943 (1981). I think the commentator has mistaken our holding in Stastny. Certainly the requirements of Rule 23 are just as

applicable to discrimination cases as to any others and this was as true before Rodriguez as after Rodriguez. It was expressly so held in Rodriguez.

Nor is certification ever a perfunctory act, as the majority seems to assume. We have made this crystal clear in a number of cases, Doctor v. Seaboard Coast Line R.Co., supra, 540 F.2d at 706-07; Windham v. American Brands, Inc., 565 F.2d 59, 64, n. 6 (4th Cir. 1977), cert. denied, 435 U.S. 968; Shelton v. Pargo, Inc., supra, 582 F.2d at 1312-15; Belcher v. Bassett Furniture Industries, Inc., supra, 588 F.2d at 906. Of these, Shelton v. Pargo reviews the issue in considerable depth. To follow a view that it is irrelevant whether certification was proper or not if discrimination at trial is later established would mean that Rule 23 would be without meaning or effect and would be just a jumble of words stated in hypocritical

mandatory terms. District Courts could at their discretion proceed on the bare allegations of the complaint and, whether certification was proper or not, the subsequent class trial will not be reversed if class discrimination is found. That certainly, I submit, is not the law of this Circuit nor does it accord with the best thought on the subject.[37] It is, of course,

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[37] In Shelton, supra, we cited and discussed a monograph prepared under the auspices of the Judicial Center and authored by the leading scholar in the area of class actions, Professor Arthur Miller. In line with the language of Justice Stewart in Rodriguez, he repudiated any notion that certification under Rule 23 was ever a perfunctory matter. He declared that, in certifying a class, the Rule required at least seven specific findings of fact, which, in the normal case, could only be made on the basis of some inquiry into the facts of the case. All of this careful procedure, as outlined by Professor Miller and as adopted by us in Shelton and as declared in Rodriguez, would be nullified by any rule of perfunctory certification merely because a claim of racial discrimination was asserted. It may be that, following the procedure outlined by Professor

regrettable that the trial is aborted but this is no more unfortunate than the reversal of the judgment on the merits in Ste. Marie v. Eastern R.Ass'n, supra, 650 F.2d 395, because the district court had not followed the procedure declared in Burdine.

Footnote 37 continued

Miller would mean that a trial in an erroneously certified class action might be aborted, despite a finding after trial that there had been class discrimination. This might be regrettable but it is not a proper justification for setting aside the clear requirements of Rule 23 any more than the ultimate result in Ste. Marie, supra, was any justification for disregarding the procedure mandated in Burdine. If the mandatory requirements of the Rule are to be disregarded and set at naught because we think a correct result has been reached despite the plain violation of the Rule before trial, there is no point in having any Rules. I cannot believe the majority would subscribe to such a principle. Certainly, we did not follow any such principle in Hill and Hirst.

The plaintiffs in this case have sought to find support in our decisions of Cox[38] and Goodman,[39] for the right of Brown and Black, neither of whom had any claim of discrimination in promotion, to represent a class asserting such claim. Both of these cases preceded the decision in U. S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), while the Circuit and District Courts were still struggling with the so-called "headless" class action, in which the individual claim of the class representative had been dismissed. That situation prompted the argument that the class action itself should be dismissed if, on appeal,

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[38] Cox v. Babcock & Wilcox, 471 F.2d 853 (4th Cir. 1973).

[39] Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978).

A like case is Simmons v. Brown, 611 F.2d 65 (4th Cir. 1979).

it was determined the individual claim of the class representative was meritless. It must be noted at the outset, though, that in those cases the class representative had alleged properly an individual claim and that the class of which he had been certified as a class representative was composed strictly of those with a like claim to that of the class representative. There was thus no defect in the certification. The question was whether the loss, after trial, of his individual claim, required the dismissal of the class action. We felt it was contrary to the policy of Title VII to dismiss the perfectly valid class certification under those circumstances and so we formulated the rule that, in such a case, we would hold the case in abeyance for a reasonable time in order to give some proper class representative a reasonable opportunity to come forward and replace the original class representative.

But-- and this is the point the plaintiffs overlook in discussing Cox and Goodman: we only extended the opportunity to intervene to persons who had a similar claim of discrimination to that of the original plaintiff; there was no opportunity to enlarge by way of a belated intervention the class to present any discriminatory claim other than that asserted by the original plaintiff. That was made perfectly plain in Goodman where, in remanding the action, we instructed the district court that the action should "be retained on the docket for a reasonable time to permit a proper plaintiff or plaintiffs, with grievances similar to those of Goodman, Debrew, or Mrs. Martin, in person, to present himself to prosecute the action as a class representative" (Emphasis added).[40] Geraghty made it unnecessary to go

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[40] 584 F.2d at 1332-33.

This exact language as used in Cox and Goodman was repeated in Simmons, 611 F.2d at 67.

through this procedure, since it held that, after certification, the class representative presents two claims, one being his individual claim and the other his class claim, and the dismissal or mootness of the individual claim will not moot the class claim; the class representative may continue to press his class claim but only the class claim which he can properly assert, i.e., one asserting a discrimination suffered by him.[41]

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[41] The majority seems to find something in Geraghty inconsistent with Rodriguez. There is no inconsistency. The two decisions dealt with two entirely different questions. Rodriguez involved the question whether a plaintiff who had not suffered injury like that of the class he sought to represent could be a proper class representative under Rule 23 and Article III. That is our question and it was decided in the negative, which is what I submit should be the decision in this case. In Geraghty, however, the plaintiff had suffered the same injury as that asserted in the class claim both at the time he filed his suit and at the time he sought class certification. In that specific

Footnote 41 continued

situation the Supreme Court held that the mere fact that subsequent to the denial of class certification the plaintiff's individual claim became moot would not moot his appeal of the denial of class certification-- but the Supreme Court made it quite clear that "[i]f the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial still would not prevent mootness of the action" (Emphasis added), 445 U.S. 407, n.11. And the Supreme Court repeated at the conclusion of its opinion that "[i]f [on remand] the District Court again denies class certification, and that decision is affirmed, the controversy on the merits will be moot." 445 U.S. at 408. As the writer of the Note, The Personal Stake Requirement in Federal Class Action Litigation, 33 Baylor L.Rev. 337, 342, put it:

> "The Court's decision in Geraghty is based upon a division of the personal stake requirement into two distinct categories: (1) the named plaintiff's claim on the merits, and (2) his claim that he is entitled to represent the class. A personal stake is required for each" (Emphasis added).

The point of difference between the two cases is that in Rodriguez neither at the time of the filing of the action nor at the time of the

Finally, I do not urge that Hill must be followed forever in this Circuit. Though I should regret it since I agree with the decisions in Hill and Hirst, I accept the right of a majority of this Court to overrule Hill and Hirst-- but I submit it cannot be overruled by what appears to me to be improper distinctions, but only by an en banc court and certainly can only be done if we

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Footnote 41 continued

certification decision had the class representative suffered the same injury as the class he sought to represent and that, by way of contrast, in Geraghty, as the Supreme Court repeatedly stated, the plaintiff had sustained the same injury as the class he sought to represent as a class representative both at the time he filed his suit and at the time the district court made its decision on class certification.

Rodriguez and Geraghty are not thus inconsistent; they are in fact perfectly consistent and I would think it unseemly for us to assume that the Supreme Court was unable to perceive such inconsistency and remove it if there were any. I can only assume that the Supreme Court found the two decisions consistent and I submit we should accept that decision and not attempt to read into the two decisions an inconsistency which the Supreme Court did not perceive.

are to give the decision in Rodriguez a different construction than did this Court in Hill and Hirst. Until Hill and Hirst are reversed by an en banc court, I submit we should follow them. To do otherwise is to create confusion in the law for both litigants and district courts, and to leave the rights of the parties to depend on the panel as constituted. I do not think any member of the Court wants this.

V

Finally, I submit that the district court erred in finding class discrimination in this case. In the first place, the two named plaintiffs had concededly suffered no injury by a denial of promotion. One had been promoted, the other made no claim of qualification for promotion. The actual injury claimed by both of the plaintiffs was discriminatory discharge, not promotion discrimination. More importantly, the record does not identify a single individual employee who had

a valid claim of promotion discrimination. This, however, was not because of any lack of effort to discover one. On June 14, 1977 the district court "entered an order allowing a bifurcated trial wherein the first stage was to determine the liability of the defendant Company, if any, to the plaintiffs and class members." Notices of such action were sent to 466 persons, employees in the classes designated in the certificate, advising them that, if they had suffered any injury within the class certification they would have a claim. The Court then declared that "[t]he following class members presented claims" pursuant to such notice, identifying them. Only one of those filed a claim of promotion discrimination and that one the district court found was, by her own admissions, unqualified for promotion (Janice Orr Mackey). In essence, then, we have here a finding of class discrimination

in promotion under a complaint filed by complainants who had admittedly suffered no promotion discrimination and after a trial in which not a single employee with a valid complaint of a promotion discrimination, even though any employee with such a claim had been invited and solicited by the court itself to assert it, came forward to assert such a claim. In the fact of that record, how did the district court find class-wide discrimination in promotion?

The bases for the district court's finding are two facts only: 1. The defendant's method of selection was subjective; and 2. The statistical evidence. It would seem that the challenge to the subjective method of promotion would be answered effectively by the failure of the plaintiffs to find one single employee who had been discriminated against in promotion, even though every minority employee in the relevant units had been

solicited to file a claim of promotion discrimination.[42] The second circumstance is somewhat odd. The district court simply looks at the over-all employment statistics of the defendant at the relevant facilities, stated in racial terms, and then compares it with the racial distribution of supervisory jobs in those facilities. On that basis, the court found that there was an imbalance in the racial composition, which could only be accounted for by racial discrimination in promotion. I pass over the question whether the record, in which all employees are considered equally qualified for promotion, and turn to the question of whether such statistics, unsupported

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[42] Cf., Knutson v. Boeing Co., 655 F.2d 999, 1000-01 (9th Cir. 1981) ("The showing that Boeing used subjective selection criteria will not alone make out a prima facie case of disparate impact").

by a single identifiable instance of discrimination, can be deemed to supply a basis for a valid finding of promotion discrimination. I submit it may not.

This is a case, to put it bluntly, where a court has erected a structure of promotion discrimination without absolutely any proof of such discrimination, and, on that basis, has imposed on this defendant a burden of continuous reporting to, and surveillance of its operations by, the district court. I submit, however, that the record in this case, which reveals not one instance of discrimination in promotion, despite the most persistent effort to find one, does not warrant such an imposition either on the defendant or on our limited judicial resources.

CONCLUSION

I submit that both the judgments on the individual claims and on the class claim as granted by the district court should be reversed and set aside and the action dismissed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

SHIRLEY BROWN and DOROTHY BLACK (Plaintiffs) and ALMETTA IVEY (Intervenor), individually and on behalf of all others similarly situated,	
Plaintiffs-Intervenor,	
vs.	Civil Action No. C-C-76-146
ECKERD DRUGS, INC., a corporation, now merged with JACK ECKERDS CORP., a corporation, and ECKERD'S PROVIDENCE, INC., (Store #4), a wholly owned subsidiary of ECKERD DRUGS, INC., now merged with JACK ECKERDS CORP.,	
Defendants.	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Michael Sheely, Sheely and Brooks, 418 Law Building, Charlotte, North Carolina 28202, Shelley Blum, Raleigh, North Carolina, for plaintiffs.

John Pollard and J. W. Alexander, Blakeney, Alexander and Machen, 3450 NCNB Plaza, Charlotte,

North Carolina 28280, and Austin Reed, P. O. Box 4687, Clearwater, Florida for defendants.

Before James B. McMillan, District Judge, Western District of North Carolina, Charlotte Division.

Tried: April 20, 21, 26, 27, 28, 1978; Non-jury.

Decided: June 9, 1978 by Memorandum of Decision on File.

This is an action brought pursuant to 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981. The complaint was filed on May 5, 1976. The complaint, subsequent to motions by the plaintiffs and orders of this Court, was amended on July 7, 1977, and August 17, 1977. Plaintiffs seek injunctive relief to remedy alleged unlawful employment discrimination practices and to provide specific relief for each individual who has suffered from these practices. Based on the evidence and the exhibits, and after

hearing and weighing the evidence, deciding on the credibility of witnesses (and believability of their testimony), viewing the demeanor of witnesses, considering the interests of the witnesses and considering the arguments of counsel, the Court, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, makes the following

FINDINGS OF FACT

I

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5(f).

2. The plaintiffs have complied with the administrative requirements of Title VII (42 U.S.C. §2000e et seq.).[1]

II

PARTIES

3. Plaintiffs Shirley Brown and Dorothy Black are adult black female residents of Charlotte,

Mecklenburg County, North Carolina (Testimony of plaintiffs).

4. Defendant Eckerd Drugs, Inc. (the "Company"):

(a) is a corporation which transacts business in North Carolina;

(b) is involved in the retail merchandising business, and operates retail stores, a warehouse, and its corporate offices in Mecklenburg County, North Carolina;

(c) is a person within the meaning of 42 U.S.C. §1981, and an employer within the meaning of 42 U.S.C. §2000e et seq.[2]

5. Defendant Eckerd's Providence, Inc. is a wholly owned subsidiary of Defendant Eckerd Drugs, Inc. and employed plaintiff Black. Defendant Eckerd's Providence, Inc. received many services from defendant "Company."[3]

6. Defendant Eckerd's Providence, Inc is a person within the meaning of 42 U.S.C. §1981,

and an employer within the meaning of 42 U.S.C. §2000e[4] et seq.

7. Defendant Eckerd Drugs, Inc., since the filing of this action, has merged with defendant Jack Eckerd, Inc. (Testimony of Almetta Ivey, Dale Whitworth).

III

CLAIMS OF PLAINTIFFS

A. Shirley Brown

8. Shirley Brown was employed by the Company on September 9, 1974.

9. She worked at the main office of the Company as a keypunch operator.

10. Her immediate supervisors were Ms. Penney Hart and Mr. John Straughn, who are both white.

11. Between January 14, 1975 and March 17, 1975, she was absent from work due to the birth of her child. She was scheduled to return to work on April 7, 1975.

12. Ms. Brown returned to work on March 17, 1975. Because of medical difficulties resulting from the birth of her child, Ms. Brown left work on March 19, 1975 and returned to work on April 7, 1975, as previously scheduled. Prior to leaving on March 19, 1975, Ms. Brown asked about the possibility of part-time work and was told by Ms. Hart that it was not available.

13. Upon her return to work, Ms. Brown encountered difficulties with white employees, and asked Ms. Hart to have her work station changed. Ms. Hart refused to do so initially, and said Ms. Brown's station would be changed when those of everyone in the keypunch area were changed. At the time Ms. Brown made her request, other operable work stations were available. Ms. Brown went over Ms. Hart's head by going to Mr. Straughn, who was the supervisor of Ms. Hart, and requested that he instruct Ms. Hart to change Ms. Brown's work

station. Mr. Straughn informed Ms. Brown that Ms. Hart ran the keypunch section and it was up to Ms. Hart. Finally, in late April, 1978, some three weeks after Ms. Brown's initial request, the work station of Ms. Brown was changed. During this period, there were several empty stations. Ms. Brown's station was changed at the same time as other persons.

14. Subsequent to Ms. Brown's return to work, Ms. Brown encountered programming changes. She sought the assistance of Ms. Hart, who did not respond to Ms. Brown's requests. A fellow employee showed Ms. Brown the nature of the changes.

15. Ms. Brown received praise concerning her job performance from Ms. Hart on three occasions prior to June 3, 1975.

16. On June 2, 1975, Ms. Brown heard Mr. Straughn use the term "nigger" while looking at her. At the time, she was the only black working in the

Keypunch area.

17. On June 3, 1975, Ms. Brown, at the request of Ms. Hart, met with Mr. Straughn, Ms. Hart,[6] and Ms. Glenda Hanner.

18. The conference had been called by Ms. Hart and Mr. Straughn to discuss Ms. Brown's attendance record, her work performance, and her attitude toward the Company. (Testimony of Shirley Brown.)

19. The meeting was described as a counseling session. (Testimony of Penney Hart and Glenda Hanner.)

20. The first subject of discussion was Ms. Brown's attendance record. Ms. Brown, in answering the questions of Ms. Hart and Mr. Straughn, said she would do her best to be at work, and not be absent every time her child was sick.[7] (Testimony of Shirley Brown.)

21. The second subject discussed was Ms. Brown's job performance. She was shown a "statistic"

sheet, which showed her errors in keypunching. She stated that she had asked Ms. Hart about programming changes, had requested assistance, and had not received any from Ms. Hart. This was the first time Ms. Brown had been shown a "statistic" sheet. (Testimony of Shirley Brown.)

22. At the beginning of the meeting, Ms. Straughn informed Ms. Brown that the Company was not happy with her attitude. During the course of the meeting, Mr. Straughn struck his hand on the desk and stated to Ms. Brown, "Girl, you are going to make me say something I do not want to say here." Also, during the course of the meeting, it was suggested that Ms. Brown should quit. Ms. Hanner, during the meeting, interpreted the statements of Ms. Brown and questions of Mr. Straughn and Ms. Hart to Ms. Brown. Tempers were high on both sides.

23. Ms. Hanner asked Ms. Brown if she thought the meeting was a "black-white" matter. Ms.

Brown answered in the affirmative, and asked for another black to come into the meeting. Ms. Hanner said this was impossible, since there were no "qualified" blacks, Ms. Hart told Ms. Brown that she was a fool for going over her head. (Testimony of Shirley Brown.)

24. Ms. Brown left her job under pressure, from Ms. Hart, Mr. Straughn, and Ms. Hanner.[8]

25. The treatment plaintiff received in the meeting would not have occurred had Ms. Brown been white; her conflict with her superiors was due at least in part to her race.[9] Ms. Brown's separation from employment was in part due to her race.

B. Dorothy Black

26. Plaintiff Dorothy Black was hired by defendant Eckerd's Providence, Inc. in August, 1970. (Testimony of Dorothy Black.)

27. In 1972, Ms. Black was promoted to fountain manager at Store Number 4.[10] (Testimony

of Dorothy Black.)

28. Mr. Bobby Wall became the manager of Store Number 4 in 1975. (Testimony of Bobby Wall.)

29. On September 9, 1975, Mr. Bobby Wall heard Ms. Black speak in a rude manner to a white customer.[11] (Testimony of Bobby Wall.)

30. Mr. Wall terminated Ms. Black because of her rudeness to the customer. The decision to terminate Ms. Black was made by Mr. Wall and was based upon her rudeness to a customer. Ms. Black's race did not play a part in the decision to terminate her.

IV

CLASS CERTIFICATION

31. Plaintiffs moved for class certification upon the filing of the Complaint. On January 13, 1977, the plaintiffs filed a memorandum in support of class certification. By order of March 3, 1977, a class was conditionally certified. On May

12, 1977, plaintiffs filed a motion for "final" certification after notices were sent out, pursuant to the March 3, 1977 order. 466 Notices were sent, and 21 persons excluded themselves.[12] On May 24, 1978, the Court entered an order granting "final" certification of the class.

32. The class certified by the orders of March 3, 1977 and May 24, 1977 was:

Plaintiff and all blacks in the Mecklenburg County facilities of defendant and its wholly owned subsidiary, Eckerd Providence, Inc., who, since January 18, 1975, have been or may have been affected by discrimination by defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd Procidence, Inc., on the basis of race in connection with hiring, promotion, termination, job assignment, and geographical assignment; this class includes all blacks so affected who (a) are currently employed by defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd

Eckerd Providence, Inc.; (b) have been employed by defendant Eckerd Drugs, Inc. or its wholly owned subsidiary Eckerd Providence, Inc. since January 18, 1975, and have been terminated or otherwise left defendant Eckerd Drugs' employment; or (c) have applied for employment with defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd Providence, Inc. at any time since January 18, 1975, and were denied employment.

33. The facilities covered by the discovery and class in this case are as follows:

(a) Main office (code number 998); Warehouse (code number 999); and support staff (code number 987), all at 1776 Statesville Avenue, Charlotte.

(b) the retail stores covered are:

(1) Store Number 1, 100 North Tryon Street;

(2) Store Number 191, 4716 Sharon Rd.;

(3) Store Number 200, Freedom Drive Mall;

(4) Store Number 229, 316 South Tryon Street;

(5) Store Number 188, 1704 Central Avenue;

(6) Store Number 189, 5612 East Independence Boulevard;

(7) Store Number 190, 124 Sharon Amity Road;

(8) Store Number 192, 5672 International Way;

(9) Store Number 171, 6129 The Plaza;

(10) Store Number 230, Eastland Mall;

(11) Store Number 4, Providence Road.

All of the Stores are in Charlotte, North Carolina.

34. The case was tried as a class action.

35. (a) The court reaffirms its earlier

findings and rulings that the case is properly maintainable as a class action under Rule 23 of the Federal Rules of Civil Procedure.

(b) Because of the decision of Hill v. Western Electric, 596 F. 2d 99 (4th Cir. 1979), the class definition is hereby changed to exclude applicants for initial employment. The class definition is now:

Plaintiff Brown, and Intervenor Almetta Ivey and

All blacks in the Mecklenburg County facilities of defendant and its wholly owned subsidiary, Eckerd Providence, Inc. who, since January 18, 1975, have been or may have been affected by discrimination by defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd Providence, Inc. on the basis of race in connection with promotion and transfer to management or supervisory jobs; this class includes all blacks so affected who (a) are currently

employed by defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd Providence, Inc., or (b) have been employed by defendant Eckerd Drugs, Inc., or its wholly owned subsidiary Eckerd Providence, Inc., since January 18, 1975, and have been terminated or otherwise left defendant Eckerd Drugs' employment.

V

CLAIMS OF CLASS MEMBERS

36. On June 14, 1977, the Court entered an order allowing a bifurcated trial wherein the first stage was to determine the liability of the defendant Company, if any, to the plaintiffs and class members. The following class members presented claims.

A. Almetta Ivey

37. Ms. Almetta Ivey is a black adult resident of Mecklenburg County, North Carolina.

38. She was employed by the defendant company in 1969.

39. She worked in the main (corporate) office.

40. At the time she was hired, she was the only black in the main office.

41. Before December, 1975, she had been assigned duties in various areas of the office including sales tax computation and accounts receivable.

42. In December, 1975, a new department (third party receivables) was created in the office. Ms. Ivey was made supervisor of this department.

43. She held this position until June, 1977.

44. As supervisor she had difficulty in controlling a white employee. She sought assistance from her supervisor which was not forthcoming.

45. In June, 1977, Ms. Ivey was replaced as supervisor by a white female employee who was transferred in from another department. The new

supervisor was trained in part by Ms. Ivey.

46. The stated reason for Ms. Ivey's demotion was that she failed to provide monthly reports showing the status of receivables, and that these reports had been requested on several occasions.

47. One month prior to her demotion, Ms. Ivey had discussed the problem of the monthly reports with her supervisor. Her supervisor, Mr. Dale Whitworth, had given her until June, 1977 to submit the required report.

48. The system of accounting was changed in the third party receivables department in June, 1977.

49. The defendant Company did not prove that Ms. Ivey was less capable of handling the new system than the new white supervisor brought in to the department.

50. Ms. Ivey's demotion was due, at least in part, to her race.

51. Ms. Ivey's pay was not reduced as a

result of the demotion.

52. Ms. Ivey's demotion does not represent any general pattern, practice, or policy regarding demotions.[14]

53. (a) Ms. Ivey is a member of the class; her demotion, though not part of a demonstrated pattern or practice of discriminatory demotions, was a part of a racially discriminatory pattern or practice of "transferring or promoting" in management positions.

(b) Ms. Ivey filed a charge with the Equal Employment Opportunity Commission on June 24, 1977. The charge was filed within 180 days of the events complained of. Ms. Ivey received a right to sue letter dated April 24, 1979. The Equal Employment Opportunity Commission had jurisdiction of Ms. Ivey's charge for more than 180 days. Ms. Ivey, in her EEOC charge, alleged failure to promote and give raises, and a demotion because of her race. She

is an adequate class representative, and has sought to intervene. She has complied with the procedural requirements of 42 U.S.C. §2000e et seq.

(c) Since the trial of this action Ms. Ivey has left the employment of the defendant Company.

B. Bernice Grant

54. Ms. Bernice Grant is a black adult resident of Mecklenburg County, North Carolina.

55. Ms. Grant, after receiving information from an employee of the Company's warehouse about an opening, applied for a job at the warehouse on July 8, 1976. She filled out an application at the guardhouse.[15] She was not interviewed.

56. Ms. Grant failed to list her prior warehouse experience on her application. She was qualified for the job for which she applied and there was a vacancy.

57. When Ms. Grant called back to check

on her application, she was told there were no openings.

58. After Ms. Grant applied, six whites and one black were hired.[16]

59. Blacks comprised 25.9% of the warehouse workforce in 1976, and 13.8% of the hires.[17]

60. Ms. Grant was not subjected to discrimination because of her race.

61. Ms. Grant was a member of the class,[18] but because of Hill v. Western Electric, supra, she is no longer a member since she was an applicant.

C. Mattie Bridges

62. Mattie Bridges is a black adult resident of Mecklenburg County, North Carolina, a class member, and a former employee of the defendant Company.

63. She worked at the SouthPark and Eastland Mall stores of the defendant Company. She was a sales clerk. She worked from November, 1976, to

August, 1977, and in the 1977 Christmas season.

64. The manager of the Eastland Mall store was a white male named Brad Clapp.

65. In each store, employees were assigned lockers wherein they placed their personal effects. Ms. Bridges asked for a locker, and did not get one. She was told to place her coat in Mr. Clapp's office. Her coat was stolen from his office. Ms. Bridges asked for compensation for her stolen coat. This request was denied. The Court does not find that white employees were compensated for stolen items. Ms. Bridges was not subjected to different treatment because of her race.[19]

D. Linda Gabriel

66. Ms. Linda Gabriel is a black adult resident of Mecklenburg County, North Carolina. She was a class member, but because of Hill v. Western Electric, supra, she is no longer a member since she was an applicant.

67. Either in March of 1976 or the fall of 1976, Ms. Gabriel went to the Park Road store of the defendant, and sought employment. She was informed by the white manager there were no openings, but to go to the SouthPark store where there was an opening. Ms. Gabriel went to the SouthPark store and talked to the white manager. He told her that he had hired a black that morning. He also told her to go to Store #4 on Providence Road[20] where there was an opening and that that store had not filled its quota. Ms. Gabriel went to said store, saw the white manager, was informed there was an opening, and applied for a job as a cashier. Because of her prior cashier experience, she was qualified. Ms. Gabriel checked back several times, and was not hired. The manager informed her that he was still taking applications and interviewing applicants.

68. There is no evidence to show the

race of the next cashier hired at Store #4.

69. During 1976, at Store Number 4, blacks comprised 25% of hires and 21% of the store workforce.[21]

70. Linda Gabriel was not subjected to discrimination because of her race.[22]

E. Michael Jordan

71. Michael Jordan is a black adult resident of Mecklenburg County, North Carolina, a class member, and a former employee of defendant Eckerd's Providence, Inc.

72. Michael Jordan worked at Store Number 4 in September, 1975. The manager was Bobby Wall. Mr. Jordan was assigned the same duties as white part-time student employees. Mr. Jordan failed to show up on a specified working day, and did not call in with an explanation. Because of this, he was terminated by Mr. Wall. Mr. Jordan was not treated differently because of his race, and his

discharge was not racially discriminatory.[23]

F. Janice Orr Mackey

73. Ms. Janice Orr Mackey is a black adult resident of Mecklenburg County, a class member, and a former employee of defendant Eckerd's Providence, Inc.

74. Ms. Mackey worked at Store #4 from September, 1974 through December, 1974, and again from June, 1975, through May, 1976, as a fountain employee. She worked under the Distributive Education Program, meaning that she went to school from 8:00 a.m. to 12:00 p.m., and then worked the rest of the day. She was graduated from high school in June, 1976.

75. The duties of a fountain manager require being at work early in the morning to set up the fountain for a day's use.

76. Ms. Mackey was unable to work morning hours because she was a student.

77. Mrs. Mackey was not promoted to fountain manager because she was still in school and unable to perform some of the duties of a fountain manager.

78. She left her job without giving a reason in May, 1976.

79. Ms. Mackey was not discriminated against because of her race with respect to promotion, pay, discharge, or any other terms and conditions of employment.[24]

G. Blondella Rorie

80. Blondella Rorie is a black adult resident of Mecklenburg County, North Carolina. She was a class member, but because of Hill v. Western Electric, supra, she is no longer a member since she was an applicant.

81. On May 3, 1976, Ms. Rorie applied for a job at the Eckerd's Warehouse.[25] She filled out an application and was interviewed. She was

informed of an opening and was not hired.

82. The next person employed in the warehouse after she applied was black.

83. Ms. Rorie worked in the Eckerd's warehouse as a temporary in June, 1977, and not in 1976 as she testified.

84. In 1976, blacks constituted 13.8% of the hires in the warehouse, and 25.9% of the warehouse workforce.[26]

85. Ms. Rorie was not discriminated against because of her race.[27]

VI

A. Employment Procedures

86. There are no written reports regularly made concerning the quality of the work of each employee.

87. There are no distinctions made between the filling of temporary and permanent vacancies. There are no formal lines of progression into

management or supervisory jobs

88. There are no written job descriptions other than plaintiffs' trial exhibit 2, Chart 8,[28] which merely lists titles and EEO code numbers, staff job descriptions and pharmacy manager.

89. (a) There are no written criteria which are used to determine the qualifications of a person to fill a vacancy. The best available qualified employee is assigned by the management representative responsible for filling the position. There are no written reports regularly made concerning the quality of the work of each employee of the Company. Employees are evaluated on an irregular basis. There are no written criteria established to govern the evaluation.

(b) "Demonstrated ability" and "length of service" are the factors in the determination of the "best available qualified" employee to fill a vacancy. These two factors do not have

any further specifications. There is no seniority system. As stated above, there are no written criteria to determine qualifications to fill a vacancy; there are no regular, written job evaluations, there are no written criteria to govern evaluation of job performance, there was no posting of vacancies until recently, there was and still is a "word of mouth" system of notifying employees of openings in other facilities, and there are very limited job descriptions. The Company has failed to provide any written, adequate guidelines except for the recent posting of notices. The decisions as to filling the vacancies are within the unlimited discretion of a management and supervisory work force which is overwhelmingly white, especially in the stores and in the main office (998).[29]

B. Facilities/Employment Practices

90. Plaintiffs have failed to establish any general discriminatory pattern or policy as to

discharges, layoffs, demotions, pay or working conditions.

91. The percentage of blacks in the warehouse (999) workforce, and hires between 1970-76 is set forth in footnote 17, infra. Although the numbers and percentages of blacks have fluctuated considerably since 1970, the statistics do not suggest a pattern resulting from racial discrimination. There is no basis for a finding that Eckerds discriminated in hiring warehouse employees.

92. Plaintiffs' evidence establishes that blacks were hired in disproportionately low numbers in the main office from 1970-74. However, blacks composed 13.5% of the new hires in the main office in 1975; and in 1976, 34.9% of the new employees were blacks. These figures represent a significant change from the period before 1975. Because of this change, the statistical case presented by the plaintiffs is not sufficient to support a finding that

class members who applied for but were not hired into non-supervisory positions in the main office were discriminated against because of their race.

93. Plaintiffs' evidence establishes that blacks have been hired in disproportionately low numbers in certain of the stores, especially stores #171 (Plaza Road), #191 (Sharon Road), #192 (International Way) and possibly #230 (Eastland Mall). The same was true of Store #4 before 1975, but has not been true since then.

Prior to the summer of 1976, defendant had no formal system for referring applicants at one store to other stores where there might be vacancies. See Finding of Fact #91, supra.

Plaintiffs have made a prima facie showing that persons who applied for jobs at Stores #171, 191, 192 and 230 or who applied for employment at other stores when there were vacancies at any of the listed stores but not at the place of application

and who were not hired were discriminated against because of their race.[30] Defendant has not rebutted this case. Because of the Hill v. Western Electric, 596 F. 2d 99 (4th Cir. 1979) decision, said applicants are no longer members of the class, and therefore are not entitled to relief. The showing made by the plaintiffs as to hiring at stores #171, 191, 192 and 230 goes to proof of discrimination elsewhere. See Baxter v. Savannah Sugar Refining Co., 46 F.R.D. 56, 61 (S.D. Ga., 1969).

94. Aside from the top corporate management, Eckerds management and supervisory[31] employees are broken down into three major groups: (1) those associated with central office functions; (2) those directly involved in store management; and (3) those in the warehouse. Before 1973, only one black (Dorothy Black) had been employed in a managerial or supervisory position outside the warehouse.[32] Except for Almetta Ivey, no black has held a

supervisory or managerial position in the main office. (Defendants' own statistics do not even show that Ivey held a supervisory or managerial position.) Blacks have done somewhat better in direct store management positions (Assistant Manager), but only since 1976.

The evidence does not disclose any formal "lines of progression" into management or supervisory positions, although there is an informal practice of promotion from assistant store manager to store manager to district manager, and so on.

Plaintiffs have established a prima facie case that Eckerds discriminates in promoting or transferring class members into management and supervisory positions, especially in the main office. Defendant has not rebutted this case. Class members employed by Defendant company who may have applied for vacancies in managerial and supervisory jobs or who applied for promotions to higher level managerial

and supervisory jobs are entitled to present any claims they may have. Because of Hill v. Western Electric, supra, the only persons covered by this finding are those employed by defendant Company. Persons not employed by defendant Company who sought these types of positions are not members of the class.

95. Plaintiffs' evidence establishes a statistically significant difference between the black percentage of the defendant Eckerd Drugs work force in the facilities covered by this action, and the black percentage of the general population, and labor forces of Mecklenburg County, and the Charlotte SMSA.[37]

96. Employment practices by defendant Eckerd Drugs as a company, statistical evidence, and individual cases of discrimination support the finding of discrimination against the class of black employees in finding number 95.

97. Plaintiff Brown, as a result of the racially tainted end to her employment, is entitled to backpay and reinstatement.

98. Intervenor Ivey is entitled to relief because of her racially discriminatory demotion.

99. (a) Plaintiff Black and class members Jordan, Mackey, and Bridges are not entitled to relief because they have failed to prove any claim of racial discrimination.

(b) Ms. Grant, Ms. Rorie, and Ms. Gabriel are not entitled to relief because they are not class members.

100. Plaintiffs' attorneys have performed valuable services.

101. Dr. Michalowski is an expert in statistics, and performed valuable services.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter. 42 U.S.C. §2000e-(5) (f), and 28

U.S.C. §1343 (4).

2. The Court has jurisdiction of the person of the defendants.

3. Plaintiffs have standing.

4. The defendants are employers engaged in an industry affecting commerce, and had fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, within the meaning of 42 U.S.C. §2000e (b).

5. Defendants are corporations, transact business at several locations in Mecklenburg County, and are persons within the meaning of 42 U.S.C. §1981.

6. Plaintiffs Brown and Black and Intervenor Ivey have complied with the procedural requirements of 42 U.S.C. §2000e-(5) (e) and (f).

7. This is an appropriate class action under FRCP Rule 23(a) and 23 (b) (2). Plaintiffs

Brown and Black and Intervenor Ivey are appropriate class representatives. The class is defined in Finding of Fact Number 35 (b), supra.

8. A prima facie case of discrimination can be established in various ways. In McDonnell Douglas v. Green, 411 U.S. 792 (1973), the Supreme Court, in a non-class action, held a "prima facie case to consist of the plaintiff showing (s)he is a member of a racial minority; (b) applied for a job for which (s)he was qualified and for which there was a vacancy; (c) despite qualifications. (s)he was rejected; and (d) the employer continued to seek qualified applicants after the rejection." 411 U.S. at 802. The Court then noted that:

> "The facts necessarily will vary in Title VII cases, and the specifications above of the prima facie proof required of the respondent (Plaintiff) is not necessarily applicable in every respect to different fact situations." 411 U.S. at 802, note 13 (parentheses added).

The McDonnell formula has been adopted to fit situations other than hiring. See Employment

Discrimination Law, Schlei and Grossman, BNA p. 512, footnote 10 (1976) (hereinafter as Schlei at ___). In International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 (1977), the Court emphasized the flexibility of the McDonnell formula when it rejected the employer/union argument that the only way to prove individual discrimination was through the McDonnell formula. 97 S.Ct. at 1865-1866. In Teamsters, the Court, in explaining the McDonnell formula, stated that the plaintiff's evidence must show that the rejection was not based upon an absolute or relative lack of qualification or the absence of a vacancy. This is limited to situations of an individual, isolated act of discrimination. 97 S. Ct. at 1866, note 44.

In situations involving alleged policies and patterns of discrimination, the prima facie case can be established through the use of statistics alone, or in combination with evidence of

specific, overt acts of individual actions of discrimination. Teamsters, supra, 97 S.Ct. at 1854-56; Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720, 2726-2727; and Hazelwood School District v. U.S., 433 U.S. 299, 97 S. Ct. 2736, 2741 (1977). See also Barnett v. W. T. Grant, 518 F. 2d 543, 548 (4th Cir., 1975); and United States v. Chesapeake and Ohio Ry. Company, 471 F. 2d 582 (4th Cir., 1972).

9. In enacting Title VII, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity. Franks v. Bowman Transportation, Inc., 424 U.S. 747, 762-63 (1976) (emphasis added); and Chrapliway v. Uniroyal, Inc., 14 EPD Para. 7708 at page 5493 (N.D. Ind., 3/31/77, Judge Grant). The prohibition includes subtle discrimination as well as overt discrimination. See McDonnell, supra, and Hairston v. McLean Trucking, 520 F. 2d 226, 233 (4th Cir.,

1975). Title VII covers the psychological well being of employees as well as their economic well being. See Firefighters Institute v. City of St. Louis, 549 F. 2d 506, 514 (8th Cir., 1977) and Rogers v. EEOC, 454 F. 2d 234, 238 (5th Cir., 1972), cert. den., 406 U.S. 957 (1972). Ms. Brown was forced to quit under pressure from her supervisors. She was intimidated and harassed, in part because of her race. She thought herself referred to as a "nigger" on the day before the meeting, and as "girl" during the meeting by Mr. Straughn. Such racial and diminutive terms evoke a repellant historical image in minds of blacks, and evidence race bias. See Murray v. American Standard, Inc., 373 F. Supp. 716 (D.C. La., 1973), prelim. relief aff'd; 488 F. 2d 529 (5th Cir., 1973), and EEOC decision #72-0679, 12/27/71 at CCH Employment Practices Guide (Binder #1, Para. 564.321 at page 890). Ms. Brown told her supervisors she would do her best to be

present at work, and would not be absent every time her child was sick. Her supervisors insisted on absolute attendance. Ms. Brown's response was reasonable. Compare EEOC decision #72-0779, 12/30/71, CCH Employment Practices Guide Para. 618.92 (Binder #1, p. 959). She was referred to as a fool for going over Ms. Hart's head. She was subjected to the interpretation practices of Ms. Hanner. She sought assistance on her job and was denied same. Ms. Brown's work station was not moved for some three weeks after her initial request, even though she told Ms. Hart she was having difficulties with white employees, and other work stations were available. Ms. Brown, prior to the June 3, 1975 meeting, had not been criticized about her job performance, and had been praised for her job performance. It was suggested in the meeting that Ms. Brown quit. Ms. Brown has established a prima facie case (by a preponderance of the evidence

that meets her burden of persuasion) of constructive discharge which defendant failed to rebut. See Young v. Southwestern Savings and Loan Association, 509 F. 2d 140, 144 (5th Cir., 1975); Chrapliway v. Uniroyal, Inc., supra; EEOC Decision #75-166, 75-167 (1/30/75), CCH Employment Practices Guide, Para. 6544 and 6545 (Binder #3, pp. 4346-4348); Schlei, supra, at pp. 235-237; and Employment Discrimination, Larson, Matthew Bender, Vol. 3 §70 (pp. 13-16 through 13-19), and §84 (pp. 17-1 and 17-2) (1977).

10. (a) Ms. Ivey had filed a motion to intervene. She has complied with the procedural requirements of 42 U.S.C. §2000e et seq. Intervention is proper since she claims an interest in the main action which is the subject of the lawsuit. The disposition of the main action may as a practical matter impair or impede her ability to protect her interests. Her claims, and those of the main

action, have a question of law or fact in common.

(b) Intervenor Almetta Ivey, by a preponderance of the evidence that meets her burden of persuasion, has proved a prima facie case that her demotion was due in part to her race. Defendant Eckerd Drugs has failed to rebut this case. Ms. Ivey did not receive the support of her supervisors while Ms. Hart, a white supervisor, did receive the support of her supervisors. Ms. Ivey was demoted at least a month prior to the deadline for a report set by her supervisor. Historically, there have been few blacks in the main office. There have been no blacks with supervisory duties other than Ms. Ivey. Defendant Eckerd's statistical exhibit (#4) did not even list Ms. Ivey as a supervisor. Ms. Ivey was replaced by a white whom Ms. Ivey helped to train. Defendant Eckerd Drugs did not demonstrate that Ms. Ivey was less capable of handling the new system than her white replacdment, and failed to

demonstrate that Ms. Ivey's replacement was as qualified as, or more qualified, than Ms. Ivey. A demotion occurs whenever a person is reassigned to a position where she receives lesser pay, or has less responsibility, or is required to use less skill than in her former position. See United States v. Gadsden County School District, 539 F. 2d 1369 (5th Cir., 1976). Her reassignment, even though without loss of pay, was a racially discriminatory transfer.

11. Plaintiff Dorothy Black's termination was not due to her race but came about because of her rudeness to a customer.

12. Class member Jordan's termination was not due to his race but came about because of his failure to report to work. Class member Jordan's job duties were the same as white employees.

13. Class member Mackey was not denied the promotion to fountain manager because of her race.

She did not get the promotion because she was still enrolled in high school and was not available to work the necessary morning hours. Ms. Mackey quit her job voluntarily. She was not denied raises because of her race.

14. Ms. Bernice Grant failed to prove a case of discrimination because she is not a class member since she was an applicant. Furthermore, blacks represented 25% of the warehouse workforce and 13.8% of the warehouse hires in 1976.

15. Blondella Rorie failed to prove a case of discrimination (a) because she is not a class member since she was an applicant and (b) the next person hired after her application was black. Furthermore, blacks represented 25.9% of the warehouse workforce and 13.8% of the warehouse hires in 1976.

16. Class member Mattie Bridges failed to show in any manner that she was subjected to

different treatment because of her race.

17. Ms. Linda Gabriel failed to establish discrimination (a) because she is not a class member since she was an applicant and (b) since blacks represented 21% of the store #4 workforce and 25% of the store #4 hires in 1976.

18. Plaintiffs have failed to establish general discrimination in the issues of discharge, layoff, demotion, pay or working conditions.

19. Plaintiffs have failed to establish discrimination in the hiring of warehouse employees since blacks represent 18.6% of the hires between 1970-1976, and were 34% of the hires in 1972, 25.5% of the hires in 1974 and 19.5% of the hires in 1976. Blacks also constituted at least 25% of the warehouse workforce on an annual basis between 1970-76.

20. Plaintiffs have shown that blacks were hired in disproportionately low numbers in the main

office between 1970-74. In 1975 and 1976, blacks represented 13.5% and 34.9% of the hires. These numbers represent a significant change from 1970-1974. Because of this change, the statistical case presented by the plaintiffs is not sufficient to support a finding that black persons who applied for but were not hired into non-supervisory positions in the main office were discriminated against because of their race. Furthermore, such persons are not members of the class since they are applicants.

21. Plaintiffs' evidence establishes that blacks have been hired in disproportionately low numbers in store numbers 171, 191, 192, and 230. The same was true of store number 4 prior to 1975, but not since then. Prior to the summer of 1976, defendant Eckerd Drugs had no formal system for referring applicants at one store to other stores where there might be vacancies. Plaintiffs have

established a prima facie case by a preponderance of evidence that meets their burden of persuasion, that black persons who applied for jobs at store numbers 171, 191, 192, and 230, or who applied for employment at other stores when there were vacancies at any of the listed stores but not at the place of application, and were not hired were discriminated against because of their race. Defendant Eckerd Drugs has failed to rebut this case. Such persons are not entitled to any relief since they are no longer members of the class because they were applicants.

22. Aside from the top corporate management, Eckerd's management and supervisory employees are broken down into three major groups: (1) those associated with central office functions; (2) those directly involved in store management; and (3) those in the warehouse. Before 1973, only one black (Dorothy Black) had been employed in a

managerial or supervisory position outside the warehouse. Except for Almetta Ivey, no black has held a supervisory or managerial position in the main office. (Defendant's own statistics do not even show that Ivey held a supervisory or managerial position.) Blacks have done somewhat better in direct store management positions (assistant manager), but only since 1976.

The evidence does not disclose any formal "lines of progression" into management or supervisory positions, although there is an informal practice of promotion from assistant store manager to store manager to district manager, and so on.

There is no seniority system. Written job descriptions are limited to plaintiffs' trial Exhibit 2, Chart 8 (a list of titles and EEOC designation but no duties), staff jobs and pharmacy manager. There are no written criteria which are used to determine the qualifications of a person to fill a

vacancy. Prior to the recent use of notices of vacancies in the warehouse (since July, 1976) and very recent use of notices of vacancies in the main office (just before the trial of this case in April, 1978), employees would find out about vacancies through a word of mouth system. The job performance of employees is evaluated on an irregular basis. There are no written reports regularly made concerning the quality of the work of each employee of the company. There are no written criteria established to govern evaluations of job performance. The supervisory and management work force of the defendant in the main office and stores is overwhelmingly white, while there are three blacks in such jobs in the warehouse.

The evidence indicates that race is the identifiable factor explaining the absence of blacks in management and supervisory jobs. The evidence discloses no objective standards based on job-related

education, experience, ability, length of service, reliability or aptitude to account for the preferential employment opportunities which the Company has given to white persons. The Company's lack of objective, job-related standards for hiring, transferring and promoting, and its failure to post notices of job vacancies serve to corroborate the racial bias shown by the statistical pattern of the Company's work force. Brown v. Gaston County Dyeing and Machine Company, 457 F. 2d 1377, 1382-3 (4th Cir., 1972); Barnett v. W. T. Grant Co., 518 F. 2d 543, 549-550 (4th Cir., 1975).

Relying on "word of mouth" notices of job vacancies and on "walk-in" applicants to fill job vacancies constitutes a racial discrimination where, as here, those practices have the tendency to perpetuate a predominately white segment of the employer's work force. Barnett v. W. T. Grant Co., supra; Rock v. Norfolk and Western Ry., 473 F. 2d

1344 (4th Cir., 1973), cert. den., 412 U.S. 933 (1973).

Employee selection procedures which depend almost entirely upon the subjective evaluations and favorable recommendations of white persons are ready mechanisms for discrimination against black persons because racial discrimination and bias can be covertly concealed and may not even be known to the employer's higher management. Rowe v. General Motors Corp., 457 F. 2d 348, 358-9 (5th Cir., 1972).

Plaintiffs have established a prima facie case, by a preponderance of the evidence that meets their burden or persuasion, that Eckerd's discrimination in promotion, or transferring class members into management and supervisory positions, especially in the main office. Class members employed by the defendant Company who may have applied for vacancies in managerial or supervisory jobs or who applied for promotions to higher level managerial and supervisory

jobs are entitled to present any claims they may have. Defendant has failed to rebut this prima facie case. This extends to those class members employed by defendant Company who would have applied for the designated jobs and did not do so because of the racial discrimination.

23. As indicated by conclusions of law numbers 9, 10, and 23:

(a) the plaintiffs have proved, and the Court finds, that the employment policies and practices intentionally and customarily used by the Company in transferring and promoting persons into its supervisory and managerial job classifications were and are racially discriminatory. The burden of going forward with evidence, therefore, is shifted to the Company to defeat the plaintiffs' prima facie case, by showing or demonstrating that the plaintiffs' proof is either inaccurate or insignificant. In this action, the Company has failed to rebut the plain-

tiffs' prima facie case, and the plaintiffs have carried their burden of persuasion. International Brotherhood of Teamsters v. United States, supra, at 339-343.

(b) The plaintiffs have, therefore, proved that the Company intentionally engaged in unlawful employment practices alleged in the complaint within the meaning of Section 706(g) of Title VII, 42 U.S.C. §2000e5 (g). International Brotherhood of Teamsters v. United States, supra; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

(c) By proving the existence of a customary practice of racial discrimination by the Company in transferring and promoting persons into managerial and supervisory jobs, the plaintiffs have made out a prima facie case of discrimination against the individual black persons who have been subjected to that customary practice of racial discrimination by the Company. International Brotherhood of Teamsters

v. United States, supra; Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976).

(d) Each black person employed by the defendant Company who has been denied employment opportunities with the Company because of his or her race as a consequence of the Company's unlawful racial discrimination in transferring or promoting persons into the Company's supervisory or managerial job classifications is entitled to be made whole by the Company for any injuries which he or she may have suffered. Those black persons are entitled to backpay to the extent that monetary relief is needed to compensate them fully for the injuries which they have suffered as a result of those unlawful employment practices of the Company, except that the Company's backpay liability shall not accrue from a date more than two years prior to June 5, 1975, the date on which the charge on which this action was based was filed with the Commission. Interim

earnings or amounts earnable with reasonable diligence by those persons shall also operate to reduce the backpay otherwise allowable. 42 U.S.C. §2000e-5(g); Albemarle Paper Co. v. Moody, 422 U.S. 405, 412-22 (1975).

(e) Conclusions 24(a) - (d) are limited to promotion and transfer to managerial or supervisory jobs at all facilities covered by this action.

(f) Ms. Brown is entitled to reinstatement, back pay, and expungement from her record of any reference to the June 3, 1975 meeting.

(g) Ms. Ivey is entitled to expungement from her record of any mention of the demotion.

24. The claims of plaintiff Black and class members Jordan, Bridges, Mackey and Ms. Grant, Ms. Rorie, and Ms. Gabriel are dismissed because of failure to prove their claims, or because they are not members of the class.

25. As indicated by conclusions of law numbers 18, 19, 20, 21 and 22:

(a) the claims of any persons based upon hiring are dismissed since they are no longer members of the class.

(b) The claims of any class members based upon discharge, layoff, demotion, pay or working conditions are dismissed for lack of proof.

(c) The claims of any class member who applied for a pharmacist job are dismissed for lack of proof.

26. The facts proved at the "liability" stage of this action, without any further evidence from the plaintiffs, justify the Court in awarding prospective relief. International Brotherhood of Teamsters v. United States, supra, at 360-61. "Where racial discrimination is concerned, the (district) court has not merely the power but the duty to render a decree which will so far as possible

eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154 (1965)." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 418-19.

27. The Court should enjoin the Company from engaging in any and all unlawful employment practices based on race and order the Company to take appropriate affirmative action to eliminate the consequences of all unlawful employment practices which have been based on race and in which the Company has previously engaged. Albemarle Paper Co. v. Moody, supra; Franks v. Bowman Transporation Co., Inc., supra; International Brotherhood of Teamsters v. Unites States, supra.

This the 26 day of October, 1979.

s/ James B. McMillan
James B. McMillan
UNITED STATES DISTRICT COURT JUDGE

FOOTNOTES

1. Plaintiff Brown's employment ceased on June 3, 1975. Plaintiff Brown filed charges with the Equal Employment Opportunity Commission (hereinafter EEOC) on June 5, 1975. Said charge was added to on July 1, 1975, and July 16, 1975. The EEOC issued a right to sue letter on March 18, 1976. See Plaintiffs' Trial Exhibits (hereinafter "P. Tr. Ex. __") 10(a) and 10 (b); Plaintiffs' Request for Admissions 56(c), (d), (e), (f), and (k), and Defendant's Answers to said Requests. Plaintiff Black's employment ceased on September 9, 1975. She filed her original charge with the EEOC on December 18, 1975, and amended said charge on January 28, 1976. The EEOC accepted both charges. The EEOC issued a right to sue letter on July 12, 1977. See Plaintiffs' Second Amended Complaint, Defendant's Answer to Second Amended Complaint (paragraph 3), P. Tr. Ex. 10(c) and 10)d).

2. See deposition of Kent S. Hathaway (hereinafter Dep. of __ at pp. __) at pp. 4, 5; Plaintiffs' Interrogatory number 1, and Defendant's Answer to said Interrogatory; and Plaintiffs' Request for Admission 56(1) and Defendant's Answer thereto.

3. See Plaintiffs' Interrogatory Numbers 61-63 and Defendant's Answers thereto; Dep. of Hathaway at pp. 23-27.

4. See Plaintiffs' First Amended Complaint (para. 3(c)), and Defendant's Answer to First Amended Complaint (para. 3).

5. Findings of Fact numbers 8-16 are based upon the testimony of Shirley Brown. Ms. Hart testified that Shirley Brown asked for a work

station change, that she did not change the station initially, that she knew Ms. Brown was having difficulties with white employees, that Ms. Brown went to John Straughn about the work station change, that Mr. Straughn said it was up to Ms. Hart, and there were changes in the programming. In these respects, the testimony of Ms. Hart supports that of Ms. Brown.

6. Ms. Glenda Hanner is not now employed by the Company. As of June 3, 1975, she was a Vice President of the Company dealing with personnel matters.

7. Ms. Brown testified, and the Court finds, that just prior to June 2, 1975, Ms. Brown had been absent due to food poisoning of her child, caused by a product purchased from the Company.

8. Ms. Brown testified and the Court finds that when Ms. Brown left the area of the meeting (office of Mr. Straughn) she was not called back, and after she went outside to wait for a ride, Mr. Straughn, accompanied by others, told Ms. Brown to leave the Company premises or else the police would be called.

9. Company records appear to be inconsistent on whether Ms. Brown was terminated or quit.

(a) In one document, Company records state that Ms. Brown "voluntarily quit"; see P. Tr. Ex. 10(b), page 3;

(b) in the Employee Exit or Transfer, Reason number 8 (insubordination to Supervisors) was given.

In any event, the evidence, and reasonable inferences therefrom, including decisions on credibility,

support finding number 25.

10. Store Number Four is the same as Defendant Eckerd's Providence, Inc.

11. Mr. Wall had been sent to Store #4 to get matters in order. There had been customer complaints of rudeness. Mr. Wall testified that the measure of what constituted rudeness was his personal opinion.

12. See Plaintiffs' Motion for Final Certification (filed May 12, 1977), paragraphs 1 and 2. the Plaintiffs' motion involving class certification was supported by statistical exhibits and affidavits of discrimination. See Motion, Exhibits A-D.

13. The conduct of the Plaintiffs in discovery limits the class to the facilities listed in number 33, supra. Plaintiffs' trial Exhibits cover said facilities, and Defendant's trial Exhibits do not cover any other facility. The addresses of said facilities can be found at the deposition of Kent Hathaway, pp. 4-5. Defendant, of course, has opposed class certification during the entire case.

14. Findings 37-45 are based upon the testimony of Ms. Ivey. Finding numbers 46 and 47 are based upon the testimony of Dale Whitworth and Ms. Ivey. Finding 48 is based upon the testimony of Mr. Whitworth. In reference to Finding number 44, the lack of support given to Ms. Ivey, a black supervisor, is to be contrasted with the support given to Ms. Penney Hart, a white supervisor, when dealing with Ms. Brown.

15. Defendant's Trial Exhibit Number 7.

16. Pl. Tr. Ex. 14, Table 20. The Court finds the Plaintiffs' statistical Exhibits to be accurate.

The Defendant only put into evidence three statistical exhibits (1, 4, 18) which are found to be accurate as far as they go.

17. Pl. Tr. Ex. 3, Chart 26, Exhibit 14, Table 20. During all years, the Court finds that blacks were represented as follows in the warehouse:

	WORK FORCE			HIRES		
YEAR	#	%		#	%	
1970	43	28.9	Chart 1	7	17.9	Exhibit 14, Table 2
1971	34	25.4	Chart 1	2	7.0	Exhibit 14, Table 4
1972	42	30.4	Chart 1	12	34.0	Exhibit 14, Table 6
1973	35	27.6	Chart 1	2	6.0	Exhibit 14, Table 8
1974	44	29.3	Chart 1	12	25.5	Exhibit 14, Table 10
1975	43	27.6	Chart 25	8	19.5	Exhibit 14, Table 14
1976	42	25.9	Chart 26	4	13.8	Exhibit 14, Table 20
				47	18.6	

18. Findings 54-61 are based upon the testimony of Ms. Grant and the Exhibits listed in footnotes 15-17, supra. Defendant did not offer any evidence, other than Ms. Grant's application, about Ms. Grant's applying for the job.

19. Findings 62-65 are based upon the testimony of Mattie Bridges and Brad Claps.

20. Store Number 4 is the location of Defendant Eckerd's Providence, Inc.

21. See P. Tr. Ex. 14, Table 17; Exhibit 3, Chart 26 (p. 2). The Court finds that blacks comprised the following percentages of the workforce and hires at Store Number 4.

	WORKFORCE		HIRES	
YEAR	%		%	
1970	5.9	Chart 1	10.0	Exhibit 14, Table 2
1971	7.1	" 1	7.0	" 14, " 4
1972	9.5	" 1	11.0	" 14, " 6
1973	9.8	" 1	13.0	" 14, " 8
1974	9.4	" 1	3.2	" 14, " 10
1975	15.8	" 25	22.9	" 14, " 14
1976	21.0	" 26	25.0	" 14, " 17

22. Findings of Fact numbers 66-70 are based upon the testimony of Linda Gabriel and the plaintiffs' trial exhibits set forth in footnotes 21, supra.

23. Findings of Fact 71 and 72 are based upon the testimony of Michael Jordan and Bobby Wall.

24. Findings of Fact 73-79 are based upon the testimony of Janice Orr Mackey and Bobby Wall.

25. See Defendant's Trial Exhibit 6.

26. See Footnote 17, supra.

27. Findings of Fact 80-85 are based upon the testimony of Blondella Rorie, and the exhibits set forth in footnotes 25 and 26.

28. Plaintiffs' Trial Exhibit 2, Chart 8 is identified by Ms. Hanner in her deposition (see at pp. 8 (lines 21-25), 9, 10, 11 (lines 1-9) and also appears as a trial exhibit for plaintiffs in Exhibit 3, Chart 18; Exhibit 4, Chart 28; Exhibit 5, Chart 37; Exhibit 6, Chart 42; and Exhibit 14, Table 12. This provides job descriptions to the extent available in 1975-76. It merely lists job titles and EEO code numbers.

29. Findings of Fact number 86-93 are based upon the following:

#86: Plaintiffs' Interrogatory 13 and Defendant's Answer thereto.

#87: Plaintiffs' Interrogatory 22 and Defendant's Answer thereto.

#88: Deposition of Hanner at pp. 11 (lines 11-25), 12-15, 16 (lines 1-12); Deposition of Hathaway at pp. 8 (lines 16-25), 9 and 10 (lines 1-11).

#89: Plaintiffs' Interrogatory 23 and Defendant's Answer thereto.

#90: Plaintiffs' Interrogatory 25 and Defendant's Answer thereto.

#91: Deposition of Hanner at pp. 29 (lines 13-25), 30, 31 (lines 1-14).

#92: Deposition of Hanner at pp. 8 (lines 21-25), 9, 10, 11, (lines 1-9); Deposition of Hathaway at pp. 7 (lines 16-25), 8 (lines 1-3).

#93: (a) Deposition of Hathaway at pp. 10 (lines 12-25), and pp. 11 (lines 1-6); Deposition of Hanner pp. 16 (lines 13-25), 17 (lines 1-9), 18 (lines 2-4), 22 (lines 6-13), 82 (lines 6-25) and 83, and Plaintiffs' Interrogatories 18, 22, and 41, and Defendant's Answers thereto.

(b) Deposition of Hanner at pp. 16 (lines 13-25), and 17 (lines 18-22), and Plaintiffs' Interrogatory number 36 and Defendant's Answer thereto.

30. The Court finds that the following number of blacks were present and hired during the following years in the stores as numbered:

PRESENT IN STORE WORKFORCE*

	STORE #171		STORE #191		STORE #192		STORE #230	
YEAR	#W	#B	#W	#B	#W	#B	#W	#B
1973	28	0	40	0	26	1		
1974	54	0	33	0	28	0		
1975	41	0	31	0	35	2	55	2
1976	28	0	19	1	16	3	68	8

*Source: Plaintiff Exhibit 1, Chart 1; Exhibit 3, Charts 25, 26.

HIRES*

	STORE #171		STORE #191		STORE #192		STORE #230	
YEAR	#W	#B	#W	#B	#W	#B	#W	#B
1973	26	0	33	0	21	1		
1974	29	0	33	0	12	1		
1975	20	0	6	0	16	2	44	2
1976	8	0	7	1	5	0	23	5
Total	83	0	61	1	51	3	67	7
Black %:		0%		1.6%		5.6%		9.5%

1973-76 total: 262 whites (95.6%), 11 blacks (4.4%).
*Source: Exhibit 14, Tables 8, 10, 14, 16.

The annual number and the annual percentage of blacks present, and the annual number and percentage of black hires for the years 1973-1976, and total number of blacks hired between 1973-1976 at store numbers 171, 191, 192, and 230 are substantially lower than the black percentage of the general population of Mecklenburg County (1970), labor force of Mecklenburg County (1973, 1976), and labor force of the Charlotte SMSA (1970), as set forth above in footnote 30. See Pl. Tr. Ex. 7 (Table 1), 8 (Tables 1 and 2).

31. The Court finds that management and supervisory jobs are as follows:

(a) 1970-74: Pay types 1-4: There was a question as to which pay types were management and supervisory in nature. Based upon the testimony of Joy Justice, and Bernice Miller, and Plaintiffs' Tr. Ex. 15, and Defendant's Trial Exhibit 17, the Court finds Pay Types 1-4 contain management/supervisory jobs. Defendant's Exhibit 4 would provide 10 additional persons (all in the warehouse) as supervisory personnel under pay type 6.

(b) 1975-76: Job Codes 10-19.

32. See Defendant's Exhibit Number 4. The Court finds that this exhibit excluded at least 11 persons, all white, who were in management or supervisory jobs based upon the testimony of Ms. Bernice Miller. Plaintiffs' exhibits reveal that in the stores between 1970 and 1976, the following number of blacks and whites in management or supervisory jobs are as follows:

	#1		#4		#171		#188		#189		#190		#191		#192		#200		#229		#230		Total	
YEAR	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B	W	B
1970	2	0	2	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	4	0
1971	1	0	1	0	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	0
1972	1	0	1	1	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	2	1
1973	1	0	1	1	1	0	2	0	4	0	2	0	2	0	2	0	-	-	-	-	-	-	15	1
1974	1	0	3	1	2	0	3	0	2	0	1	0	3	0	2	0	1	0	-	-	-	-	17	1
1975	2	0	4	1	6	0	6	1	9	0	7	0	3	0	2	0	9	0	1	1	6	0	53	3
1976	4	0	2	0	4	0	3	0	4	0	6	0	2	0	1	0	7	0	1	2	6	1	40	3

The Court finds that the foregoing is accurate, with the addition of Dorothy Black as a fountain manager in 1972, 1973, 1974, in Store Number 4. See Plaintiff Exhibit 3, Charts 19-26. 1970-74 is covered by pay types 1-4, and 1975 and 1976 by job codes 10-19.

In the main office (998), the following numbers of whites and blacks were present in the years 1970-1976 in management of supervisory jobs:

	MAIN OFFICE		COMBINED TOTAL STORES AND MAIN OFFICE	
YEAR	WHITES	BLACKS	WHITES	BLACKS
1970	35	0	39	0
1971	37	0	39	0
1972	40	0	42	1
1973	48	0	63	1
1974	57	0	74	1
1975	44	0	97	3
1976	46	0*	86	3

Source: Plaintiffs' Trial Exhibit 3, Charts 19-26.

*Includes columns headed office and data processing on Charts 25, 26 in Exhibit 3.

1970-74 pay types 1-4 are included; 1975-76 job codes 10-19 are included.

Defendant's Exhibit 4 did not count Ms. Ivey as a supervisor, and the only blacks listed as being in management or supervisory jobs are those in the warehouse (three for each year 1970-77), store manager (1 in 1975, 1976, and 2 in 1977), assistant store managers, and 1 fountain manager (Ms. Black).

37. Plaintiffs' Trial Exhibit 17, and Testimony of Raymond Michalowski. The years of significant difference in statistical terms are set forth below:

		LABOR FORCE		
YEAR	B % AT ECKERDS	N.C.	CLT. SMSA	MECK.
1970	17	NS	NS	-
1971	14.1	S	S	-
1972	17.6	NS	NS	-
1973	14.6	S	S	S
1974	14.8	S	S	S
1970-74	14.2	S	S	S
1975	12.2	S	S	S
1976	6.8	NS	S	S

"S" indicates significant; NS indicates not significant.

See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 f.n. 20 (1977), and EEOC v. Radiator Specialty, __ F. Supp. __, 16 EPD para. 8276 at pp. 5422-23 (W.D. N.C. 3/8/78).

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-146

SHIRLEY BROWN and DOROTHY BLACK, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
-vs-	)	MEMORANDUM
	)	OF DECISION
ECKERD DRUGS, INC., a corporation,	)	
Defendant	)	

This case was tried to the court sitting without a jury beginning on April 20, 1978. After hearing all the testimony and reviewing the exhibits I have reached the following conclusions:

1. The case was filed under Title VII and 42 U.S.C. §1981. All jurisdictional prerequisites under those statutes have been met and the case is properly before the court for decision.

2. A class was certified by orders filed on March 3 and May 24, 1977. The case was tried as a

class action, and the court reaffirms the finding that the case is properly maintainable as a class action under Rule 23.

I. INDIVIDUAL PLAINTIFFS AND CLASS MEMBERS

3. Plaintiff Shirley Brown worked as a key-punch operator at the Eckerd's main office from September, 1974, until June, 1975. One June 3, 1975, she quit her job under pressure from her supervisors. The incident leading to her departure was a conference on June 3, 1975, involving plaintiff, her immediate supervisor Penney Hart, the supervisor of all data processing operations John Strong, and a personnel representative Glenda Hanner. The Conference had been called by Hart and Strong to discuss plaintiff's attendance record, her work performance and her attitude toward the company. Although the meeting was billed as a "counseling" session, tempers were high on both sides. The treatment plaintiff received in the

meeting would not have occurred had she been white; her conflict with her superiors was due at least in part to her race.

4. Plaintiff Dorothy Black worked at the store operated by defendant Eckerd's Providence Inc. (Store #4) from August, 1970, until September, 1975. In 1972 she was promoted to fountain service manager and held this job until she left. In September, 1975, she was discharged following an incident involving a customer. The decision to terminate her was made by the store manager Bobby Wall and was based on her rudeness to a customer. Plaintiff's race did not play a part in the decision to terminate her.

5. Class member Matty Bridges worked at Eckerd's stores at SouthPark and Eastland Mall from November, 1976, through August, 1977, and again during the Christmas season in 1977. Her employment during the spring and summer of 1977

and at Christmas was at the Eastland Mall store where she worked as a sales clerk. She was not subjected to any difference in treatment because of her race.

6. Class member Linda Gabriel applied for a cashier's job at Store #4 in either March, 1976, or some time in the fall of 1976. She was qualified for a job as a cashier. The evidence does not show whether the next person hired as a cashier at Store #4 was white or black nor whether any cashiers at all were hired around either of the time Gabriel may have applied. During 1976 twenty-five per cent of all new employees hired at Store #4 were black, and black employees composed twenty-one per cent of the total work force at the store. Linda Gabriel was not subjected to discrimination because of her race.

7. Class member Bernice Grant applied for a job at Eckerd's main warehouse on June 8, 1976.

Although she was qualified for warehouse work based on prior experience at Lance, Inc., she did not list this experience on her application form. From the beginning of July, 1976, through the end of the year, six whites and one black were hired at the warehouse. During all of 1976 13.8% of the new employees hired into the warehouse were black, and black employees composed 25.9% of the total work force in the warehouse. Bernice Grant was not subjected to discrimination because of her race.

8. Class member Almetta Ivey has been employed at the Eckerd's main office since 1969; she was one of the first blacks hired into the main office. Before December, 1975, she had been assigned duties in several areas of the office, including sales tax computation and accounts payable. In December, 1975, a new department was created in the office -- third party receivables -- and Ivey was made supervisor of this department. She held the

position until June, 1977. As supervisor she had considerable difficulty controlling a white employee in her department and was not able to obtain support from her superiors in dealing with this employee.

In June, 1977, Ivey was replaced as supervisor by a white woman transferred from another department. The new white supervisor was trained in part by Ivey. The stated reason for Ivey's replacement was that she had failed to supply monthly reports showing the status of the receivables and that these reports had been requested on several occasions. One month before her demotion she had discussed this problem with her superior, Dale Whitworth, and had been given until July, 1977, to submit the required report. Although the system of accounting in the third party receivables department was changed in June, 1977, defendant did not demonstrate that Ivey was less capable of handling

the new system than the new supervisor brought into the department. Her demotion was due, at least in part, to her race.

Almetta Ivey did not file a separate charge of discrimination with the Equal Employment Opportunity Commission; she is not a plaintiff or intervenor in this suit. The court does not find that Ivey's demotion represents any general pattern, practice or policy regarding demotions. There is no evidence that Ivey or any other class member who held a supervisory position was given more onerous duties or was held to a higher standard of performance than whites in comparable supervisory positions. The court would like to hear further from the parties on whether Almetta Ivey is, on these facts, entitled to any relief, and, if so, what relief ought to be afforded.

9. Class member Mike Jordan worked at Store #4 for approximately four weeks in September,

1975. He worked a total of about 36 hours. Jordan was hired as a part-time employee through the distributive education program in the Charlotte-Mecklenburg schools. He was assigned general duties as a stock clerk. Similar duties were assigned to other distributive education students at Store #4, including some white students. Jordan was not denied an opportunity to do sales and cash register work because of his race. He was discharged because he failed to show up for a scheduled working day or call in with an explanation. His discharge was not racially discriminatory.

10. Class member Janice Orr Mackey worked at Store #4 from September, 1974, through December, 1974, and again from June, 1975, through May, 1976, as a fountain employee. She worked at Eckerd's under the distributive education program until she was graduated from high school in May, 1976.

She was not denied a promotion to fountain manager because of her race but because she was still in school and unable to perform all the duties of the fountain manager. She left her job without giving any reason in May, 1976. She was not discriminated against because of her race with respect to promotion, pay or any other terms of employment.

11. Class member Blondella Rorie applied for a job at Eckerd's warehouse on May 3, 1976. She testified that she was not hired but that two weeks after she applied she was hired as a temporary worker in the Eckerd's warehouse through a local employment agency and that while she was there she saw three whites working in the warehouse who had applied when she did. Ms. Rorie did not in fact work at the Eckerd's warehouse until June, 1977. The next person hired in the warehouse after she applied in May, 1976, was black. During 1976, 13.8% of the new employees hired in the warehouse were

black and black employees composed 25.9% of the total warehouse work force. Blondella Rorie was not discriminated against because of her race.

II. CLASS ISSUES

12. The class is defined by the order of March 3, 1977, to include current employees, past employees and applicants for employment who may have been affected since January 18, 1975, by discriminatory practices at Eckerd Drugs, Inc., or Eckerd Providence, Inc.

13. Plaintiffs have not established any general discriminatory pattern or policy as to discharges, layoffs, demotions, pay or working conditions.

14. Although the numbers and percentages of blacks hired into the warehouse have fluctuated considerably since 1970, the statistics do not suggest a pattern resulting from racial discrimination. There is no basis for a finding that Eckerd's

discriminated in hiring warehouse employees. Eckerd's has recently begun posting notices of vacancies in the warehouse.

15. Plaintiffs' evidence establishes that blacks were hired in disproportionately low numbers in the Eckerd's main office from 1970 to 1974. However, in 1975, blacks composed 13.5% of the new hires in the main office, and in 1976, 34.9% of the new employees in the main office were black. These figures represent a significant change from the period before 1975. Because of this change the statistical case presented by plaintiffs is not sufficient to support a finding that class members who applied for but were not hired into non-supervisory positions in the main office were discriminated against because of their race. There is some evidence that starting shortly before the trial in the spring of 1978, Eckerd's has been posting notices of vacancies in the main office.

16. Plaintiffs' evidence establishes that blacks have been hired in disproportionately low numbers in certain of the stores, especially Stores #171 (Plaza Road), #191 (Sharon Road), #192 (International Way) and possibly #230 (Eastland Mall). The same was true of Store #4 before 1975 but has not been true since then.

Prior to the summer of 1976, defendant had no formal system for referring applicants at one store to other stores where there might be vacancies.

Plaintiffs have made a prima facie showing that class members who applied for jobs at Stores #171, #191, #192 and #230 or who applied for employment at other stores when there were vacancies at any of the listed stores but not at the place of application and who were not hired were discriminated against because of their race.

17. Eckerd's does not have and has not had any black pharmacists. In 1975 and 1976 twelve

white pharmacists were hired. The total number of pharmacists at the stores involved in this case is around 30. Analysis of the data suggests that Eckerd's could have been expected to hire one black pharmacist in 1975 and 1976 and to have shown two or three black pharmacists on its employment roster. The numbers involved are too small to give rise to any legal presumption of discrimination in hiring pharmacists.

18. Aside from the top corporate management, Eckerd's management and supervisory employees are broken down into three major groups: (1) those associated with central office functions; (2) those directly involved in store management; and (3) those in the warehouse. Before 1973 only one black (Dorothy Black) had been employed in a managerial or supervisory position outside the warehouse. Except for Almetta Ivey, no black has held a supervisory or managerial position in the main office.

(Defendant's own statistics do not even show that Ivey held a supervisory or managerial position.) Blacks have done somewhat better in direct store management positions (assignment manager), but only since 1976.

The evidence does not disclose any formal "lines of progression" into management or supervisory positions, although there is an informal practice of promotion from assistant store manager to store manager to district manager, and so on.

Plaintiffs have established a prima facie case that Eckerd's discriminates in hiring, promoting or transferring class members into management and supervisory positions, especially in the main office. Class members who may have applied for vacancies in managerial and supervisory jobs or who applied for promotions to higher level managerial and supervisory jobs are entitled to present any claims they may have.

In accord with the foregoing, plaintiffs are directed to submit by June 30, 1978, proposed findings of fact, conclusions of law, and an appropriate order or orders. If referral to a master is thought necessary, plaintiffs shall also submit a proposed order of reference, a proposed notice to class members and a proposed claim form. Defendant's comments or alternative drafts should be filed by June 15, 1978.

This 9 day of June, 1978.

s/ James B. McMillan
James B. McMillan
United States District Judge

Opposition

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ECKERD DRUGS, INC., a corporation now merged with JACK ECKERD CORPORATION, a corporation and ECKERD'S PROVIDENCE, INC. (Store #4), a wholly-owned subsidiary of ECKERD DRUGS, INC., now merged with JACK ECKERD CORPORATION,

Petitioners,

VS.

SHIRLEY BROWN and DOROTHY BLACK, Plaintiffs, and ALMETTA IVEY, Intervenor, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS BROWN, BLACK, AND IVEY IN OPPOSITION TO PETITION

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(12256)

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REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE

INTRODUCTION

A writ of certiorari should not be granted because:

(a) Neither the District Court nor the Appellate Court imposed an improper burden of proof upon the petitioners;

(b) The decision in this case presents neither an intra-circuit nor an inter-circuit conflict;

(c) This decision does not conflict with the decisions of this Court.

I.

COUNTERSTATEMENT OF THE CASE

A. Actions of the District Court

This action was brought pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq and 42 U.S.C. §1981. Respondent Brown, a named plaintiff, alleged

individual claims of harassment, intimidation, denial of job assistance, and termination because of her race. Respondent Ivey, who testified at the trial, and intervened thereafter, alleged a discriminatory demotion. Respondent Black, a named plaintiff, alleged unlawful termination. The District Court found for Brown and Ivey, and against Black.

The respondents filed a Motion For Class Certification on January 7, 1977. Petitioners never responded to this Motion. The District Court conditionally certified a class on March 3, 1977. A notice of certification was mailed to each identifiable member of the conditionally certified class. This mailing was accomplished by the plaintiffs, not by the petitioners, who contend they mailed notices. Petition at pp. 5-6. The notice did not invite class members to file claims as contended by the petitioners. Id. The notice merely informed persons of the conditional certification of the class and explained what the certification

meant. On May 12, 1977, the respondents moved for "final" class certification. The class motion was supported by nine affidavits alleging specific instances of discrimination and verified statistics which demonstrated patterns of discrimination. The petitioners filed a motion for decertification of the conditionally certified class on May 19, 1977. This motion was not supported by any evidentiary material. The District Court ordered "final" certification on May 24, 1977. The "conditionally" and "finally" certified classes were exactly the same.

The petitioners moved to certify the question of class certification for interlocutory appeal. The District Court denied this motion. It did so because the petitioners had not presented any evidence or information to the District Court that either militated against class certification or justified decertification of the class. It must be emphasized that when the class was certified (August, 1977) the respondents, in order to meet their burden under Rule

23 of the Federal Rules of Civil Procedure, had provided extensive evidentiary support for their class motions whereas the petitioners failed to present any information or evidence, let alone any evidence tending to refute the respondents.

After the trial on the merits (April, 1978), the District Court changed (narrowed) its May, 1977, class definition in light of its findings of fact. Later in response to Hill v. Western Electric, 596 F.2d 99 (4th Cir. 1979), cert. denied. 444 U.S. 929 (1979), the District Court excluded hiring claimants from the class.

After the trial, the District Court found and concluded that Ivey and Brown had been subjected to discrimination because of their race. These findings and conclusions were based upon numerous, specific findings of fact which were amply supported by the evidence.

B. The Opinion of the Court of Appeals

The United States Court of Appeals for the Fourth Circuit, with one Judge dissenting,

affirmed the District Court. The opinion is published at 663 F.2d 1268, and is set forth in the Appendix to the Petition at Volume 1, pp. 28-136, and Volume 2, pp. 137-171. The petitioners' motion for an en banc rehearing was denied. See Appendix to the Petition, Volume 1 at pp. 1-27.

In discussing the claims of respondents Brown and Ivey, the panel decision stressed that its examination of the evidence as a whole required affirmation of the District Court's findings and conclusions. 663 F.2d at 1270-1274.

The panel decision applied settled authority, as clearly and distinctly enunciated by this Court. See 663 F.2d at 1270-1274 wherein the panel discussed this Court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and applied it to the facts of the instant case as found by the District Court. The now familiar three-step approach to Title VII litigation of (i)a prima facie case; (ii) articulation of a legitimate non-discriminatory reason through the production of evidence,

and, (iii) evidence of pretext, was scrupulously applied by the panel decision. See Brown, supra, 663 F.2d at 1270-1274.

The panel decision first examined Ms. Ivey's claim. It held that she had proved a prima facie case. It also concluded that the petitioners had produced evidence of legitimate, non-discriminatory reasons for Ivey's demotion. The panel decision then examined all of the evidence and concluded that pretext was shown.

After reviewing plaintiff Brown's claims and the record evidence relevant to said claims, the panel held that the treatment Brown was subjected to made her working conditions intolerable. The Appellate Court determined that it was plausible for the District Court to conclude (based upon the series of events which constituted Eckerd's treatment of Brown) that the employer was acting to make the black employee's conditions of employment intolerable because of her race. The panel held that the petitioners had articulated legitimate, non-discriminatory

reasons in response to Brown's prima facie case, but that an examination of all of the evidence supported a conclusion of pretext.

The third issue examined by the panel was whether Brown and Black were appropriate class representatives. In deciding that Brown and Black were proper class representatives, the panel interpreted the earlier Fourth Circuit decision of Hill v. Western Electric, supra, 596 F.2d 99, which held, inter alia, that an employee could not represent a class which included applicants for initial hire.

The final issue the panel examined was the post-trial, pre-judgment intervention of Ivey. The petitioners did not challenge this action in their Petition.

II.

SUMMARY OF ARGUMENT

The respondents submit that a writ of certiorari should not be issued in this case. The panel decision in this case does not conflict with decisions of other panels of the Court of

Appeals for the Fourth Circuit. Assuming argumendo, that there is an intra-circuit conflict (which respondents vigorously deny) such a conflict, standing alone, does not justify the issuance of a writ in this particular case. Further, the panel decision does not conflict with the decisions of other Courts of Appeal. The petitioners did not cite one case from another circuit which held that an employee could not represent a class which was limited to other employees. The panel decision does not conflict with the decisions of this Court. Instead, the panel carefully applied the law as set forth in the appropriate decisions of this Court. A careful analysis of the panel's opinion and the facts of this case reveal that the petitioners' arguments are entirely without merit.

III.

ARGUMENT

A. The Decision of the Court of Appeals Does Not Conflict With Decisions of Other Panels Within the Same Court

The petitioners argue that a writ should be issued on the basis that the Brown decision conflicts with other panel decisions within the Fourth Circuit. Petition at pp. 19-23. The only case cited by petitioners in support of this contention is Hill v. Western Electric, supra, 596 F.2d 99 (4th Cir. 1979). In Hill, a three judge panel, relying upon East Texas Motor Freight Co. v. Rodriguez, 431 U.S. 395, (1977), held that current employees could not represent a class which included applicants for initial hire. The basis of the Hill decision was that current employees and rejected applicants for initial hire have different and competing interests. 596 F.2d at 99-102.

Petitioners further contend that the Brown panel "...made no effort to distinguish Hill...." Petition at p. 22. This contention is without merit. The panel interpreted Hill and explicitly held that the Hill decision did not conflict with the District Court's decision in the instant case.

> "In Hill, we held, in the circumstances of that case, that an employee, who had been hired, could not represent a class that included persons who were denied employment altogether. However, Hill did not preclude an employee who suffers some particularized employment discrimination grievance from representing other employees who present factually differing claims that, nevertheless, proceed on the same legal theory of race discrimination." 663 F.2d at 1275.

There is no conflict between Hill v. Western Electric, supra, and the Brown decision. The Brown case involved a fact situation wherein both class representative status and class membership were explicitly limited to employees (i. e. persons who, within a specified period of time, were employed by the petitioners). The class definition did not include applicants (persons who had never been employed by the petitioners). In fact, as noted above, following the Hill decision, the District Court redefined the class to exclude those persons who had never been employed by the petitioners (i. e. those who had hiring claims). The factual differences between the instant case and the Hill decision

led the panel to conclude that the Hill decision did not apply to the facts in the instant case. All the panel did was interpret the earlier Hill decision. Clearly it is appropriate for a panel of a United States Court of Appeals to interpret an earlier panel decision of the same Court. Petitioners, in a meritless effort to obtain a writ of certiorari, pin the label of "conflict" upon what is clearly an interpretation of an earlier decision.

B. Assuming an Intra-Circuit Conflict Exists, Such a Conflict Does Not Justify the Issuance of a Writ of Certiorari in This Case

Assuming arguendo, that the Brown decision conflicts with the Hill decision. This alleged conflict does not call for a writ of certiorari. It is incumbent upon Courts of Appeals to reconcile their own internal difficulties. It is not only incumbent upon said Courts, it is primarily their task to do so, Wisniewski v. United States, 353 U.S. 901, 902 (1957). See also Davis v. United States, 417 U.S. 333, 340

(1974); and Stern and Gressman, Supreme Court Practice, 5th Edition (BNA, 1978) pp. 275-276.

This Court has limited the granting of certiorari to cases involving both a true intra-circuit conflict and an additional important factor. See e. g. Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967); Maggio v. Zeitz, 333 U.S. 56159-60 (1948); and, Scarborough v. United States, 431 U.S. 563, 567, n. 4 (1977). Neither a true intra-circuit conflict nor the other factors are present in the instant case. As noted by this Court in Wisniewski v. United States, supra, 353 U.S. 901, 902, any intra-circuit conflict should be resolved by the Court of Appeals and not this Court.

C. The Decision of the Court of Appeal Does Not Conflict With Decisions of Other Courts of Appeals Including the Third Circuit Decision of Scott v. University of Delaware, 601 F.2d 76 (1979)

The petitioners argue that a writ should be issued in this case because Brown conflicts with the Scott decision of the Third Cir-

cuit. Petition at pp. 19, 21. In Scott, the Third Circuit held that the plaintiff (an employee) could not represent a subclass of applicants for initial employment because of a conflict of interests which arose because (i) Scott challenged the primary hiring criterion of a doctoral degree while utilizing his doctoral degree to support his personal claim of a discriminatory denial of promotion; and (ii) his interests as a faculty member whose contact was subject to renewal were in conflict with the interests of applicants for positions on the faculty, 601 F.2d at 86-88. The issue and facts in Scott are the same as those raised in the Hill decision (i. e. employees attempting to represent applicants for employment in a class action). As discussed above (see III, Argument, Section A at pp. 9-11), Brown does not involve the Scott issue or facts. The Brown class membership and representatives were limited to persons employed at one time or another by the Petitioners. There is no conflict between the Brown and Scott decisions.

It should be noted that in the Scott opinion, the Third Circuit referred to its earlier decision of Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3rd Cir. 1975), cert. denied., 421 U.S. 1011 (1975). See 601 F.2d at p. 86, n. 4. In the Wetzel decision, the Third Circuit noted that the plaintiffs contended that their resignations were not voluntary, 508 F.2d at 247-48. In Wetzel, the Court stated that employees could represent a class limited to employees. Id. Thus, the holding of the instant case is consistent with, instead of conflicting with, the law of the Third Circuit as set forth in Wetzel.

The petitioners implicitly argue that this Court's granting of certiorari in General Telephone Co. of Southwest v. Falcon, Number 81-574, 50 U.S.L.W. 3465 (12/8/81) requires that certiorari be granted in this case. See Petition at p. 22. In the Falcon case, the petition for certiorari had a single question which reads as follows:

> "Question Presented: May employee who was never rejected for employment by defendant, and who alleged that he had been discriminated against solely with regard to promotions and not by means of any procedures used by employer in hiring, bring employment discrimination suit under Federal Rules of Civil Procedure 23 on behalf of class of persons who were allegedly discriminated against solely with regard to hiring." 50 U.S.L.W. 3385 (11/10/81).

In Falcon v. General Telephone Company of Southwest, 626 F.2d 369 (5th Cir. 1980), reinstated 25 F.E.P. Cases 1735 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit held that an employee could represent a class of applicants. The Falcon decision conflicts with the Hill and Scott decisions which hold that an employee cannot represent applicants in a class action. The Falcon, Hill, and Scott decisions do not conflict with the panel decision in the instant case because of the factual differences. In the instant case, as stated above, class membership and class representative status were limited only to employees while in the Falcon, Hill, and Scott decisions the facts and issues involved class

representative status of an employee and class membership of applicants. Thus the granting of certiorari in the Falcon case does not require a writ here because of the vital differences in the facts and issues.

D. The Decision of the Court of Appeals Does Not Conflict With Prior Decisions of This Court

1. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Petitioners argue that the panel decision conflicts with the Burdine decision of this Court. In Burdine, this Court held that the (i) plaintiff must prove a prima facie case by a preponderance of the evidence; (ii) the employer must produce evidence which articulates a legitimate, non-discriminatory reason for its actions; and (iii) the plaintiff must show that the proffered reason is pretextual. The trial court can examine all of the evidence to see if pretext is present. 450 U.S. at 255, n. 10.

A trial court is not bound to believe the evidence of an employer just because it is

produced. See e. g. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 342, n. 24 (1977). A court may examine all of the evidence bearing on the presence or absence of discrimination when it determines whether the plaintiff has met his burden of persuasion. See e. g. Burdine, supra, 450 U.S. at 255 n. 10; Spagnuolo v. Whirlpool Corporation, 641 F.2d 1109, 1112-1113 (4th Cir. 1981); Loeb v. Textron, 600 F.2d 1003, 1015 n. 14 (1st Cir. 1979); and Roman v. ESB, 550 F.2d 1343, 1350-51 (4th Cir. 1976). The defendant in order to prevail, must produce admissable evidence which should pass "judicial scrutiny," and withstand a showing by the plaintiff that it is "unworthy of credence." See e. g. Wright v. National Archives, 609 F.2d 702, 714 n. 13 (4th Cir. 1979), and Burdine, supra, 450 U.S. at 253-256 (text and footnote 10). The evidence must be credible. Factors involved in evidence passing "judicial scrutiny," and withstanding challenges to its credence include decisions of credibility and weight. Fictitious

reasons, though superficially legitimate, may be found to be pretextual when all of the evidence is examined. The employer's proffered reason, standing alone, may be a legitimate, non-discriminatory reason, but when examined with all of the evidence it may fail because of pretext.

The District Court's decision at issue herein was rendered before the Burdine case was decided by this Court. However, the panel carefully applied the Burdine analysis to the facts as found by the District Court. The Appellate Court held that an examination of all of the evidence in the Ivey and Brown claims supported the District Court's conclusions of discrimination. In doing so, it concluded that the District Court had implicitly found pretext. Petitioners apparently would reverse all pre-Burdine trial court decisions which correctly allocated the burdens of proof but failed to neatly label each piece of evidence as "prima facie," "legitimate, non-discriminatory reasons," and "pretext." The District Court is not required to engage in such

labeling as long as it allocated the parties' burdens in the manner required by the Burdine decision. See e. g. Merriweather v. Hercules, Inc., 631 F.2d 1161, 1165-1166 (9th Cir. 1980); and, Sessions v. Rusk State Hospital, 648 F.2d 1066, 1071 (5th Cir. 1981).

The petitioners also argue that:

> "...if the Court determines from all of the evidence then before it that a defendant has successfully rebutted the plaintiff's claims, it cannot later turn around and rule that the same evidence, with nothing more, supports a finding of pretext." Petition at p. 26, f. n. 11

This argument is both a misstatement of what the panel did, and the law set forth in the Burdine decision. A careful examination of the panel decision reveals that the panel did not utilize the same evidence to reach the conclusions that the petitioners rebutted the prima facie cases of Brown and Ivey, and that pretext was present. The panel reached the conclusion that petitioners rebutted the prima facie cases of Brown and Ivey by considering only the evidence that the petition-

ers produced in response to said claims. Respondents quote from the panel decision:

> "The next step in the Burdine analysis is the employers rebuttal. Eckerd met its burden to rebut Ms Ivey's prima facie case. Eckerd showed that Ms. Ivey was unable to control her department's noise level, that she left uncompleted work while she was on vacation, and that she failed to provide monthly reports in a timely fashion. Taken together, those deficiencies could comprise legitimate and nondiscriminatory grounds to demote Ms. Ivey." 663 F.2d at 1272.

and

> "Again Eckerd offered enough evidence to rebut the prima facie case. The refusal to reassign Ms. Brown to a new station may have been mere compliance with a sensible departmental practice. Her supervisor may not have refused to assist her, if the supervisor's testimony is believed. The condescending behavior at the meeting may, as Eckerd claims, have been Ms. Brown's irrational perception due to her anger. In sum, Ms. Brown may have been properly discharged because of her insubordination at the meeting." 663 F.2d at 1274.

It is clear that the panel considered all of the evidence when it concluded that pretext and discrimination were proven by Ivey and Brown. Again quoting the Appellate Court:

Taking together all of the evidence which comprised the plaintiff's prima facie case and the defendant's rebuttal one might reasonably conclude, even without any additional evidence from the plaintiff, that the deficiencies in Ms. Ivey's performance were beyond her control, that Mr. Whitworth was aware of that fact, and that he fired her, at least in part, because she was black. Judge McMillan reached that conclusion. Alternatively, one might conclude that the deficiencies were the sole reason for her dismissal. On appeal, we need not-indeed, may not-choose between the two, because the district court's conclusion was not clearly erroneous and, therefore, must be accepted. 663 F. 2d. at 1272.

and

However, even granting that Eckerd offered sufficient proof of facts to demonstrate a legitimate reason for Ms. Brown's constructive discharge, it was the district court's role to evaluate all of the evidence in order to determine whether the reason advanced was a pretext. Here, again, the plaintiff was not required, under Burdine, to introduce new evidence to show that the employer's legitimate reason was a pretext. Looking at all the evidence, one might reasonably conclude that the employer deliberately harassed Ms. Brown until it succeeded in prevailing on her to quit, and that the motivation was racial bias. That was the conclusion the district court reached. 663 F. 2d. at 1274.

The petitioners' argument, as shown by

the foregoing, is a mistatement of what the panel did, and the law as set forth in the Burdine decision. The panel decision, following the Burdine format, examined only the evidence of the petitioners to determine if the petitioners had produced legitimate non-discriminatory actions. It then examined all of the evidence to see if pretext and discrimination were proven.

The petitioners' argument assumes that once the employer has articulated a legitimate, non-discriminatory reason for its action, the plaintiff's evidence which supports the plaintiff's prima facie case can no longer be considered in any determination of whether pretext can be shown. This argument is wrong. This Court has specifically held that the trier of fact can look at the plaintiff's evidence, including properly drawn inferences, to determine if pretext is present. Texas Dept. of Community Affairs v. Burdine, supra, 450 U. S. at 255, N. 10.

It is important to note that the panel decision pointed out that the petitioners' success-

ful rebuttal of Brown's individual case depended upon the credibility of a supervisor's testimony:

> "Her supervisor may not have refused to assist her, if her supervisor's testimony is believed." 663 F.2d. at 1274.

The District Court resolved the credibility issue in favor of Brown. As pointed out by this Court in Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at pp. 253-255, the proffered reason of the employer need not be the actual reason, and the plaintiff could show pretext by persuading the trier of fact that the employer's proffered reason was unworthy of credence. It is clear that this particular reason advanced by the petitioners was unworthy of credence in light of all of the evidence.

A brief survey of the specific findings of the District Court and careful reading of pages 1270 - 1275 of the panel decision show that the panel meticulously followed the mandate of the Burdine decision. It reviewed the evidence which constituted the prima facie cases of Ivey and Brown. (663 F.2d at 1271-1274) It then re-

viewed the evidence which petitioners produced to articulate their legitimate, non-discriminatory reasons. (663 F.2d at 1271-72, 1274). Finally, it examined all of the evidence and reached the determination that pretext was shown, and that the District Court reasonably concluded that Ivey and Brown were victims of discrimination because of their race. (663 F.2d at 1272-1274). As noted by the panel, the conclusions of the District Court were supported by ample evidence, and the District Court's findings were not clearly erroneous. (663 F.2d at 1271-74).

The petitioners argue that the District Court and Court of Appeals placed an improper burden of proof upon them, Petition at pp. 26-27. This argument is without merit. As established by the foregoing, the Court of Appeals carefully applied the mandate of the Burdine decision to the facts as found by the District Court and reached the conclusions as the District Court did. Assuming arguendo that the District Court imposed an improper burden of proof (which respondents vig-

orously deny), the Court of Appeals imposed the proper burden of proof through its meticulous application of the standards of the Burdine decision.

2. East Texas Motor Freight v. Rodriquez, 431 U.S. 395 (1977).

The petitioners assert that the panel decision conflicts with the Rodriguez decision of this Court. In Rodriguez this Court held that where plaintiffs lost their individual claims prior to class certification, said plaintiffs could not represent the class since they were not part of it. This Court stressed several facts in reaching its holding: (i) The plaintiffs were not members of the proposed class since they lost their individual claims; (ii) They failed to move for class certification prior to the trial; and, (iii) The members of the class voted against the type of judicial relief sought by the plaintiffs. This Court's analysis was couched in terms of the plaintiffs' abilities to "fairly and adequately protect the interests of the class." 431 U.S.

at 403-405. In Brown, the respondents engaged in extensive discovery and filed timely motions for certification. The relief they sought did not conflict with the expressed will of any class member. Black was an adequate class member even though she lost her individual claim. See Rodriquez, 431 U.S. at 406, n. 12. Brown prevailed on her claim. It is clear that the facts present in the instant case are distinguishable from the Rodriquez facts.

IV.

CONCLUSION

A writ of certiorari should not be granted because:

(a) Neither the District Court nor the Appellate Court imposed an improper burden of proof upon the petitioners;

(b) The decision in this case presents neither an intra-circuit nor an inter-circuit conflict;

(c) This decision does not conflict with the decisions of this Court.

For the reasons set forth above, respondents submit that the petitioners' request for a writ of certiorari should be denied.

This the 6 day of April, 1982.

SHEELY & BROOKS

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